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# INTERNATIONAL LAW STUDIES

Volume 71

## The Law of Armed Conflict: Into the Next Millennium

Michael N. Schmitt & Leslie C. Green  
Editors



Naval War College  
Newport, Rhode Island  
1998



## IN MEMORIAM

This book is dedicated to the memory of Professor W. Thomas Mallison—shipmate, scholar, patriot, and friend.





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## Foreword

The International Law Studies series was initiated by the Naval War College to publish essays, treatises, and articles that contribute to the broader understanding of international law. With this volume we recognize Rear Admiral Charles H. Stockton, on the 100th anniversary of his assumption of duties as the President of the Naval War College, for his contributions to the study of international law at the College, and his influence on the development of the law of naval warfare. Indeed, Admiral Stockton is largely responsible for this series, which has become known as the "Blue Books."

As the 20th Century draws to a close, it is particularly fitting to look into the future to examine how the law of armed conflict, and the international community's effort to effectively enforce adherence to it, may develop in the next millennium. Over the past century, the changes in this body of law have been dramatic. From a law based largely on custom and practice, and primarily focused on basic humanitarian protections for combatants and noncombatants, today the law is increasingly based on conventions addressing the means and methods of war. Yet as significant as these changes have been, those in the nature of conflict and the manner in which war is conducted have been even greater. Low-intensity conflict within nations has become increasingly frequent over the last half of the century. Accelerating technological advances have made possible weapons with capabilities that have fundamentally altered the manner in which wars are fought. Even space looms as a potential battlefield. It has been and continues to be a challenge to adapt the law to what has appropriately been described as a revolution in military affairs.

This volume consists of articles written by some of the world's most highly regarded experts on the law of armed conflict. While the opinions expressed are those of the individual authors, and not necessarily those of the United States Navy or the Naval War College, they collectively provide valuable insights into possible developments in the law regulating armed conflict, and how that law will be enforced. On behalf of the Secretary of the Navy, the Chief of Naval Operations, and the Commandant of the Marine Corps, I extend to the editors and the contributing authors our gratitude and thanks.

JAMES R. STARK  
Rear Admiral, U.S. Navy  
President, Naval War College



Charles H. Stockton



## Introduction

One century ago, Commander Charles H. Stockton assumed the Presidency of the United States Naval War College. Although not a lawyer, his appointment heralded an important milestone in the development of international law, particularly the law of armed conflict, during the 20th Century. For instance, in 1890 he prepared the U.S. Navy's first Naval War Code, *The Law and Usages of War at Sea*. Issued the following year as General Order 551, this work is fairly characterized as the naval equivalent of the Lieber Code. Stockton was also primarily responsible for the tradition of bringing renowned international law scholars to the War College, including Brown's George Grafton Wilson and Columbia's John Bassett Moore. Convinced of the need to "link the college with the universities of the country and place the service in greater sympathy with our more thoughtful men," Stockton also maintained close working relationships with many other luminaries of academia, such as Thomas Woolsey of Yale.

Following his tenure as President, Stockton went on to command the battleship USS *Kentucky*, serve as the U.S. Naval Attaché in London, and achieve the rank of Rear Admiral before retiring in 1907. Despite retirement from active service, Stockton continued his efforts in international law. An original member of the American Society of International Law, he addressed its first annual meeting in 1907, became a frequent contributor to the *American Journal of International Law*, and served on its Executive Committee until 1924. In 1908 Stockton led the U.S. delegation to the London Conference, which was tasked with drafting a code of naval warfare. The Conference eventually produced the Declaration of London of 1909. Although never ratified by any country, the Declaration has been applied in a number of conflicts and continues to influence the practice of naval warfare even today.

Stockton received his first law degree in 1909, an honorary doctorate from George Washington University. He was soon thereafter appointed to the faculty of the University, where he wrote two of his most influential works, *Manual of International Law for the Use of Naval Officers* and *Outlines of International Law*. Stockton was appointed President of George Washington University in 1910; today Stockton Hall houses its law school.

Two visible legacies of Admiral Stockton's influence remain at the Naval War College. First, since 1951 his vision of hosting recognized scholars of international law has been reborn in the form of the Stockton Chair of International Law. Holders have included, *inter alia*, Manley Hudson, Hans

Kelsen, Richard Lillich, Howard Levie and Robert Turner. Their presence has added a dimension of inquiry into international legal problems unavailable at any other such institution in the world. Second, the War College's International Law Studies series (colloquially known as the "Blue Books") continues a tradition of War College publication in international law that began during the Stockton era. Indeed, the third Blue Book was written by Stockton himself in 1899, and the first numbered volume was authored by Stockton's friend, John Bassett Moore. Since then, over seventy of the volumes have been published.

In light of these legacies, it is particularly apropos that the centenary of the Stockton presidency be commemorated with a Blue Book consisting of contributions by an internationally distinguished group of scholars. Moreover, much as Stockton's work reflected on the state of the law of military operations at the turn of a new century, it is a propitious moment in history to reflect on the direction this *corpus* of jurisprudence is likely to take as we enter a new millennium—thus, *The Law of Armed Conflict: Into the Next Millennium*.

As editors, we took a rather unorthodox approach to our task. Most edited works are developed thematically. An editor develops a theme, fleshes it out into sub-topics, and seeks experts to comment thereon. By this method, we would have selected topics which we (perhaps presumptuously) anticipated to likely be of normative significance in the future and parse them out to contributors. However, our purpose was not to peer into the future as *we* saw it, but rather to gather a distinguished, provocative, and insightful group and provide them an unconstrained forum in which to reflect on the future as *they* perceived it. Thus, we were less editors than we were facilitators of the essays contained in this book. Though we did at times suggest topics to certain of our contributors, we only did so because of our sense that they might have something particularly fascinating to say on the subjects. Some wrote on entirely different topics, and that was fine because in great part we were interested not only in what contributors had to say, but also in what issue they chose to comment on at this point in history.

The result is a collection of insightful essays which are analytical, predictive, and aspirational in nature. Moreover, while some of the authors took a macro approach towards evolution (revolution?) of the law, others elected to examine a micro issue which they believed to be particularly significant for the next millennium. Interestingly, though a number of contributors highlight common features of tomorrow's normative environment—such as the role of non-State actors and the effect of next generation weaponry—the only thread that



consistently seems to run through most of the essays is that of implementation of the law of armed conflict by way of effective enforcement measures. The calls for new law are rather muted; instead, the emphasis of most contributors is on rendering the existing prescriptive architecture effective. This diversity was as we had hoped, for our intent was to produce a work that caused others to think beyond the present, to reflect on where, as a global normative community, we might—and should—be headed.

In the production of any such work, there are many friends and colleagues to thank. Obviously, we are most grateful to the distinguished group of scholars who gave of their time and thoughts to make this book possible. Working with each and every one of them has been an absolute pleasure. At the Naval War College's Center for Naval Warfare Studies, Dean Robert Wood and Captain Dan Brennock were, as always, extraordinarily supportive of the project, both financially and substantively. So, too, was Colonel "Buck" Buckwalter, the Senior Air Force Adviser at the Naval War College. Dean Barbara Safriet of Yale Law School graciously extended the offer to host Lieutenant Colonel Schmitt as a Visiting Scholar for the year during which the book was developed, thereby making possible editing in an intellectually rich environment. We also extend our gratitude to two of our colleagues in the War College's Oceans Law and Policy Department—Professor Jack Grunawalt and Colonel Lou Reyna—who selflessly devoted themselves to the often thankless task of proofreading. Further, we are grateful to Captain Ralph Thomas and Lieutenant Colonel James Duncan, the unsung heroes of the International Law Studies series. They are the ones who make the series work, from design to publication to distribution. We were also most fortunate to have had the superb support of two naval reservists, Lieutenant Commanders Sarah Supnick and Tom Wingfield, who during critical periods in the production of the book served as editors while we were away. But for their hard work, the project would have been delayed many months. We owe a special debt of gratitude to Mr. Pel Boyer of the Naval War College Press for making his editorial expertise available to us throughout the project. We are also grateful to Ms. Carole Boiani and Ms. Gina Vieira of the War College's Publications and Printing Division. They managed the herculean task of pulling together manuscripts prepared in disparate styles and with sundry software from around the world, and then suffered a sea of revisions, with unflappable grace and good humor. Finally, as anyone who has ever taken on such a project surely realizes, in the end it is the family which suffers as the best laid plans become rushed deadlines and missed dinners. Therefore, it is

to Lilian, Lorraine, and Danielle that we owe our most heartfelt expression of gratitude.

By the time this book is published, both of us will have departed the Naval War College for other venues. Our time here has been enjoyable, beneficial, and productive—we cannot imagine how it could have been improved. As we leave, it is our hope that those who come here to consider international law in the next one hundred years find it to be the fertile intellectual environment that it has been over the past century.

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## Rear Admiral Charles H. Stockton, the Naval War College, and the Law of Naval Warfare

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John Hattendorf

SINCE ITS FOUNDING IN 1884, the U.S. Naval War College has played a role in the study and formulation of the law of armed conflict. Many distinguished scholars and lawyers have taught, researched, and written studies in this field at the College. The roll call of its professors of international law includes such distinguished scholars as John Bassett Moore, George Grafton Wilson, Manley O. Hudson, Hans Kelsen, Thomas Mallison, and Howard Levie.

Many of the most well-known names are those of scholars who held the position as a part-time appointment and worked at the Naval War College for a few months each year, while also holding chairs at major civilian universities. This policy changed only in July 1951, when the Secretary of the Navy created the College's first two full-time civilian academic appointments: a professor of history and a professor of international law. For many years both were normally held by visiting scholars for a one or two-year period. On 6 October 1967 the College named the law position the Charles H. Stockton Chair of International Law.<sup>1</sup> In attaching the name of Stockton to one of its oldest and most prestigious academic chairs, the Naval War College remembered a naval officer who was a key figure in its own institutional history as well as an important figure in the development of the law of naval warfare. Today, the prestigious Stockton Chair at the Naval War College, and Stockton Hall, the home of the Law School at The George Washington University in

Washington, D.C., are the principal tokens of his memory and his achievements.

Looking behind those names, one finds that the man, Charles Stockton, had an extremely successful forty-six-year career as a naval officer, ashore and afloat. In some respects he was a person of remarkable contrasts. A man with strong ethical and religious beliefs, he was largely self-taught in the area of international law, but through his active service at sea he became fully aware of the need for his fellow officers to understand the practical applications of law in their daily responsibilities. A quiet and studious person, he nevertheless loved active duty at sea. Deeply interested in naval history and strategy, as well as an advocate of preparedness and a strong navy, he was devoted to developing an international consensus and public awareness of legal restraints on warfare. Among all his many activities, Stockton's contributions to the development of the law of naval warfare stand as his most important achievement. They are among the foundations upon which future work in the law of armed conflict rests.

### **Early Life**

International law only gradually entered Stockton's life as he pursued his career.<sup>2</sup> Setting out to be a naval officer, he eventually found that his family background, early education, and his experiences at sea as a naval officer had laid a firm foundation for his interest in the subject as well as the basis of his outlook as to its practical application. In addition, his repeated assignments to the Naval War College provided him with his first opportunities to study international law in depth and to make an original contribution to it. Exemplifying the broader development of international law within the United States during the late nineteenth and early twentieth centuries, Stockton's life reflects how one individual developed an interest in the subject, an interest arising from his own fundamental religious and moral beliefs, as well as from his perceptions as a naval officer during the rise of the United States as a world power.

Charles Herbert Stockton was born in Philadelphia, Pennsylvania, on October 13, 1845, the second child and eldest son of thirteen children. His parents were William Rodgers Stockton, of an old New Jersey family, and Emma Trout Gross, the daughter of Gottlieb Gross, who had immigrated from Württemberg in about 1810. Bearing the name of Charles' grandfather of Burlington County, New Jersey, that side of the family was well known for literary accomplishments. Among them were the writer Louise Stockton, the



journalist John D. Stockton, the novelist Frank R. Stockton, and the Rev. Thomas H. Stockton, a celebrated ecclesiastical orator and the chaplain of the House of Representatives, whose prayer accompanied Lincoln's Gettysburg Address at the dedication of the battlefield cemetery in 1863.

When Charles Stockton was born, his father was operating a real estate business in a triangular-shaped building at the corner of Ridge Avenue, 11th Avenue, and Buttonwood Street in Philadelphia. The family occupied the upper floors of the building, while the father operated his business on the ground floor. Following a successful business career, during which he was prominent in city affairs, Stockton's father began to study for the ministry. He was ordained a deacon in the Episcopal Church in 1858 and a priest in 1859. The family moved to Evansburg, Pennsylvania, in 1858, when Stockton's father was appointed rector of St. James's Church there as well as of St. Peter's Church in nearby Phoenixville in Montgomery County, the site of an iron works. In those years, the young Stockton grew up as "a gentleman's son;" his family was well off, and he naturally associated with boys from other cultivated families. For a time young Stockton attended the Germantown Academy, where his classmates were children of well-to-do families. There, he joined them in playing cricket and "town-ball," the forerunner of baseball.

On the Evansburg parish's two-hundred-acre glebe farm, family life in the period from 1858 to 1861 had a great affect on young Stockton. He particularly enjoyed the active, rural life of Montgomery County, with its Pennsylvania Dutch population and their idiomatic use of English mixed with German expressions. In addition to the moral influences of his family and from the various religious communities of that region, he was deeply impressed with the idea of community, of joining a variety of different types of people. Interested in politics from an early age, the fifteen year old Charles joined in the activities of the Wide Awake Club, participating in its election marches in 1860 to support Abraham Lincoln for president and William Morris Davis for representative from Pennsylvania's fifth congressional district.

When the Civil War broke out soon after Lincoln's inauguration, there was a widespread military spirit throughout the country, and like many other young boys, the now sixteen-year-old Charles Stockton tried to enlist as a corporal in the cavalry. Rev. Stockton, however, approached a number of people to produce for his son a better opportunity. He wrote to his relative in Washington, Rev. Thomas Stockton, the chaplain to Congress; Thomas, however discouraged the military idea and argued that Charles should pursue his education, preferably a religious one. "The more I see of war," Thomas Stockton wrote, "the more I value *peace*. I can only *tolerate* war, as a sort of

Providential necessity. Surely God would never suffer it, except as a sad instrument of some good accomplishment, hardly to be otherwise attained.”<sup>3</sup> (It was a thought that Charles kept in mind, even at the end of his life, when he recorded the note verbatim in a memoir of his early days.) Rev. William Stockton, however, also wrote to his newly elected congressman, William Davis, asking him to obtain an appointment to West Point. Davis, who had been to sea as a young man in a whaling ship and later published memoirs of those years,<sup>4</sup> suggested that young Stockton should try the Naval Academy, where he had an appointment available.

### **First Years in the Navy**

The Civil War had been going on for six months when Charles Stockton entered the Navy on November 14, 1861. The three-month soldiers who had enlisted at the outset of the war had already been discharged, and the call was out for volunteers to serve three-year terms. The Naval Academy had moved to Newport, Rhode Island, for its security, since a large proportion of the border state of Maryland was disaffected toward the Union. After Charles took and passed the entrance examination for the Naval Academy, his father returned to Pennsylvania and resigned from one of his two churches, St. James’s Church, and moved to take charge full-time of St. Peter’s at Phoenixville. Charles’s parents lived there for the remainder of their lives. Phoenixville became home to Charles on leaves of absence from the Naval Academy and in later years from service afloat.

At the Academy in Newport Stockton spent his plebe year on board the old frigate *USS Constitution*, eventually moving to the school’s main building in the former Atlantic House Hotel. With no previous connections with the sea or with naval officers, the impressionistic teenager long remembered his first sight and sound of Newport harbor. Among his vivid memories were the profound silence of the early dawn in the harbor and on the Bay. “At times large clipper ships anchored to await favorable winds,” he later wrote, “and often in the early morning they would get underway with the land breeze and stand out of the harbor. I heard from them for the first time in weighing anchor the shanty songs of the sea, with the refrain made by the clank-clank of the windlass.”<sup>5</sup> Stockton received his first seamanship instruction at the Academy on board the *USS Marion*, commanded by Lieutenant Commander Stephen B. Luce, with whom he would later have additional connections. Under Luce’s skillful direction, *Marion* became a very successful practice vessel for midshipmen, who sailed it the length and breadth of Narragansett Bay.



The Civil War had an immediate effect on the Stockton family. No sooner had Charles joined the Navy than his father took a leave of absence from his parish to be chaplain of the 61st regiment of Pennsylvania Volunteers. Captured by Confederate forces under Major General D. H. Hill at the Battle of Fair Oaks during the Virginia Peninsular campaign in 1862, Chaplain Stockton was first sent to Libby prison and then to Salisbury, North Carolina, where he was eventually released with several other chaplains and doctors. Upon his release he returned to his parish work in Phoenixville.

Naval Academy midshipmen were given summer leave in 1863, and Stockton returned home to Phoenixville, just before the Confederate Army of Northern Virginia under Robert E. Lee invaded southern Pennsylvania. Stockton once again attempted to join the Army and to assist in defending his state. His attempt was, he later recalled, “without success, as I was a midshipman, neither fish, flesh or fowl or, as the Cape Cod men say, good red herring.”<sup>6</sup> Disappointed, Stockton did not see action at Gettysburg or elsewhere. In the autumn he returned to his studies at the Naval Academy in Newport. There he did poorly in both pure and applied mathematics but maintained a high standard in ethics, English, and international law, a subject he first met during his final year at Newport.

At that time, there was no suitable textbook available to the U.S. Navy for studying international law. The most authoritative American work was Henry Wheaton’s *Elements of International Law*, first published in 1836. Wheaton had been dead for a dozen years, and several editors had revised and updated his book. In 1865, two competing eighth editions were on the market. The first, by the Boston lawyer and author of *Two Years before the Mast*, Richard Henry Dana, had appeared in 1863. In 1865 William Beach Lawrence, a well-known writer living in Newport, published another eighth edition, claiming that the Wheaton family had given him the sole right of revision.

During his Naval Academy years Stockton called on Lawrence, a relative of his Academy roommate, Beach Carter, at his beautiful home in Newport’s Ochre Point district. The former American diplomat and onetime lieutenant governor of Rhode Island impressed Stockton as an exceptionally learned but a very contentious man, one who seemed to seek and enjoy litigation. The Naval Academy found itself in a difficult position, since Lawrence, living in the same town, contested the Academy’s use of Dana’s version. Actually, officials at both the Naval Academy in Newport and at the Navy Department in Washington preferred Dana’s work to Lawrence’s, taking exception to some of Lawrence’s views on U.S. policy during the Civil War. (On later reflection, Stockton himself felt that Dana’s edition was far superior to Lawrence’s, feeling

that Dana's notes on recognition of belligerency and independence remained classics on the subject.) Lawrence took his case to court, which decided the issue in his favor, preventing Dana's edition from being published in the United States (although it was printed and sold in Britain). Since the Navy would not allow the use of Lawrence's version, the Academy fell back on two general works, Theodore Woolsey's *International Law* and Chancellor Kent's *Lectures*. Neither of these authors dealt with the subject in the practical and thorough way necessary to meet the needs of naval officers.

### Assignments at Sea and Ashore

Like most of his fellow midshipmen, Stockton was deeply disappointed not to have been able to take an active part in the naval actions of the Civil War. Doing that had been the very reason to join the Navy in the first place. To a young man like Stockton, thirsting for action, it was of little consequence to have served as part of the midshipmen garrison of Fort Adams, guarding the entrance to Narragansett Bay, or serving in the Naval Academy's practice vessels when they had been placed on alert for possible raids from the Confederate raiders they never sighted: *Florida*, *Tacony*, and *Tallahassee*. Nevertheless, such service was enough to qualify Stockton and his classmates in the Naval Academy class of 1865 to wear the Civil War medal, to give them all the retirement benefits from that war, and make them eligible to be original members of the Military Order of the Loyal Legion.

In the summer of 1865 the Naval Academy was ordered to return to its original home in Annapolis, Maryland, despite protests from Rhode Islanders, who wanted it to stay in Newport. Stockton was on USS *Marion* when she was towed from Gardiner's Bay off Long Island to the mouth of the Pawtuxet River in Chesapeake Bay, where the midshipmen briefly went ashore. There they found a variety of fresh fruits, fish, oysters, and game for the taking, things that the wartime economy of New England had denied them, luxuries that now seemed food for the gods. The event proved more than an escapade to Stockton, who apparently contracted malaria during that run ashore. The ship proceeded to Annapolis, and Stockton transferred to the steamer *Winnipeg*, his quarters for the remainder of his days at the Naval Academy. After passing final examinations, the Academy class of 1865 was graduated at the end of September, and Stockton returned to Phoenixville to await orders to sea duty.

Within a fortnight the Navy Department ordered Stockton to the steam sloop USS *Dacotah*, where he was joined by four Academy classmates. During his first three months on board *Dacotah* he had two bouts of malaria. The Navy



Department placed Stockton on sick leave, and then on limited duty. Returning to full seagoing service some months later, he first served in the USS *Sabine*, where the commanding officer attested to the “fine bearing and intelligence” of Stockton, “a young officer full of promise.”<sup>7</sup> From there he was ordered in May 1866 to join the commissioning crew of the screw steamer USS *Chattanooga*. Built at Cramp’s shipyard in Philadelphia, she was a long wooden vessel designed during the war to pursue and capture Confederate raiders, but her experimental direct-acting engines gave difficulties. In the midst of trials, in which the ship failed to live up to expectations, an epidemic of what appeared to be cholera broke out among the crew, and the Navy permanently laid her up.

After that inauspicious beginning, Stockton transferred to the USS *Mohican*, then being repaired at Boston and a sister ship of his first ship, the *Dacotah*. Stockton remained on board *Mohican* for nearly three years. Upon her recommissioning after the yard period, the ship sailed for duty on the Pacific Station in September 1866, stopping enroute at St. Thomas in the Virgin Islands, several ports in Brazil, Montevideo, and then passing through the Cape Horn inside passage to Valparaiso, joining the Pacific Squadron at Callao, Peru, in April 1867.

Stopping at the island of Maranhão on the northern coast of Brazil to coal ship, Stockton witnessed his first practical situation in international law, in a case that he later used at the Naval War College to illustrate the need for naval officers to include international law in their daily professional knowledge. One of the ship’s boats, under the charge of Midshipman George Talcott, was lying alongside a stone jetty waiting for orders. Bored, several of the boat’s crew jumped off the boat and ran into town. Talcott pursued and fired a revolver at them in an open, crowded street. The local authorities quickly arrested Talcott for violating the law and held him at the police station. The commanding officer of the *Mohican*, Commander Edward Simpson, disregarding the legal issues, demanded that local authorities immediately release Talcott and threatened to bombard the city if they refused to comply. When news of this reached the Brazilian capital, the U.S. ambassador, Watson Webb, immediately requested that the Navy Department relieve Simpson for his high-handed conduct. In the end, the affair quieted down; municipal officials returned Talcott to his ship, and *Mohican* proceeded on her passage to the Pacific without further diplomatic delay. Stockton, however, never forgot the incident.

From the rendezvous at Callao, *Mohican* sailed to Acapulco and, eventually, San Francisco. Stockton’s ship was homeported there and assigned to the

newly established North Pacific Station, which stretched as far north as the mouth of the Mackenzie River on the Arctic Ocean. Stockton particularly enjoyed California, which in the days following the Gold Rush had become a haven for many who were trying to recover fortunes lost during the Civil War. Stockton made a number of close friends, enjoying the cultivated social life that these permanent residents had created.

When the *Mohican* was decommissioned and went into repairs at the Mare Island Naval Shipyard, Stockton and his fellow officers were transferred to the iron-hulled, steam gunboat *Mohongo*. Stockton was on board the ship during a seven-month diplomatic mission to the Kingdom of Hawaii, during which she received on board King Kamehameha V, Dowager Queen Emma, the American minister, chargé d'affairs, and other officials. He closely observed the practice of diplomacy in the overtures that Americans were making to the Hawaiian government, as the ship cruised throughout the Hawaiian chain, carrying officials, patrolling, and making hydrographic surveys.

Returning to San Francisco in April 1868, *Mohongo* received a new commanding officer, Commander Stephen B. Luce under whom Stockton had been trained in seamanship at the Naval Academy. Under Luce, *Mohongo* cruised in the Gulf of California, visiting such Mexican ports as La Paz, Mazatlan, Guayamas, Acapulco, and San Blas. During that cruise, one event particularly stood out in Stockton's memory. Because commercial shipping was both unreliable and irregular from Mexico, it was the practice for commanding officers of both British and American warships to carry silver (a major Mexican export) as freight, with a percentage given to the captain, the admiral, and the naval pension fund. Mexican law allowed silver dollar coins to be exported, if a tax were paid, but prohibited the export of silver bars. At Mazatlan the ship received nonetheless both bags of silver dollars and quantities of silver bars for shipment to banks in San Francisco. Stockton recalled, "A canoe laden with bars of silver would steal alongside and a loud whisper of 'plata' was heard and then a treasure net duly buoyed and lowered and the silver hoisted on board and stowed in the storerooms of the cabin of the Captain." It was, he thought "an unsatisfactory and not a dignified proceeding."<sup>8</sup>

Detached from *Mohongo* when the ship was laid up for extensive repairs, Stockton and his fellow officers moved their quarters to the receiving ship *Vanderbilt*, ostensibly assigned to the USS *Ossipee*. The Navy Department soon ordered Stockton to return to the East Coast by rail. He traveled in a party that happened to include William B. Ogden, the president of the Chicago and Northwestern Railroad, and his family, enjoying their conversation and joining



them with the picnic-basket dinners that a San Francisco Hotel provided, including “an excellent red wine for the sandy deserts of Nevada and Utah.”<sup>9</sup>

Returning home to Phoenixville, Stockton soon received orders to the Philadelphia Navy Yard, where he served for only a few months before being ordered to sea again. Joining the screw sloop *USS Congress* on her first voyage, he remained as a watch officer for four years, the longest service he spent in any one vessel during his career. On her first deployment she was the flagship of Commodore Joseph F. Green, commanding the South Atlantic Squadron, based at Key West.

Stockton was in Southern waters when the Franco-Prussian War broke out and the German gunboat *SMS Meteor*, under Lieutenant-Commander Eduard von Knorr, engaged the French corvette *Bouvet* off Havana in an indecisive action on November 9, 1870. The German ship remained in that neutral harbor for the rest of the war. Shortly after returning to Key West, *Congress* sailed to Santo Domingo, where the ship remained through the months in early 1870 during which President Ulysses S. Grant considered its annexation. The ship carried the U.S. commissioners to various points in the country, providing and supporting an armed party ashore to guard against insurgent attacks against the government during the negotiations with the United States.

In 1871 *Congress* sailed for New York, where she served as flagship for Vice Admiral Stephen Rowan to receive the Grand Duke Alexis and a squadron of Russian ships. Following this formal diplomatic assignment the ship sailed to Godhavn on the island of Disco, off western Greenland, taking supplies to the *USS Polaris*, which Captain Charles F. Hall was preparing for exploration in the Arctic. Returning south, *Congress* made a cruise to Haiti in early 1872 before being ordered to join the Mediterranean Squadron. There Stockton observed another telling situation in international law. When Rear Admiral James Alden ordered the *Congress* to sail to Constantinople in the wake of anti-Christian riots that threatened the lives of American missionaries, the U.S. Minister, George Boker, found that the Ottoman government would not allow the three-thousand-ton warship to enter the Dardanelles, because that government’s policy was to bar passage to all but small warships, under eight hundred tons. Diplomatic negotiations had been going on over this issue for years, but Admiral Alden was unaware that State Department authorization was necessary before sending a warship to the Dardanelles. Completely insensitive to international law, Alden’s view was that he was under orders to protect Americans and that since Constantinople was one place where rioting was taking place, he would provide protection there.<sup>10</sup> Stockton clearly saw that the issue was not that simple. For him, it was further personal experience

of the need for naval officers to study and to understand the practical applications of international law.

Detached from Congress, Stockton returned home on leave of absence until October 1873, when he served at the Philadelphia Navy Yard and on board USS *Dictator* before joining the commissioning crew of the USS *Swatara*, a new ship being built at the New York Navy Yard (under the guise of “repairs” to an older vessel of the same name). Upon her completion *Swatara* departed from New York in June 1874 to take five scientific parties to the South Pacific for observations of the transit of Venus, leaving them on Tasmania, Kerguelen Island, New Zealand, Chatham Island, and Melbourne, Australia. Upon completion of their work she collected her passengers and returned to New York, via the Cape of Good Hope, in May 1875.<sup>11</sup> On this round-the-world cruise, Stockton served as senior watch officer. His commanding officer later reported to the secretary of the navy that he was “one of the most reliable, trustworthy and gentlemanly officers in the service.”<sup>12</sup>

After detachment from the *Swatara*, Stockton returned home to marry Cornelia Carter of New York on June 23, 1875, before moving with her to Washington, D.C., where he had orders to spend the year 1875-1876 at the Hydrographic Office. During this period his wife gave birth to a daughter<sup>13</sup> but died in childbirth on July 1, 1876, just after Stockton had received orders. His new assignment was the wooden-hulled screw steamer USS *Plymouth*, operating on the Atlantic coast and in the Caribbean. Not aware of the personal tragedy Stockton had experienced, one of the midshipmen remembered Stockton as *Plymouth*’s “navigator. Silent and scholarly, he kept much to himself.”<sup>14</sup> At the end of that tour of duty the commanding officer reported that “in everything that goes to make an efficient naval officer, Mr. Stockton excels.”<sup>15</sup>

In June 1879 Stockton reported for duty at the Navy Yard in New York, where he served for a year. While in New York he met Pauline Lentilhon King, a daughter of Peter Vandervoort King, and married her on November 23, 1880. Detached from the Navy Yard in May 1880, he went first to Newport, Rhode Island, where he took the course of instruction at the Naval Torpedo School on Goat Island, and from there to the Washington Navy Yard.

The Navy Department next ordered Stockton to sea duty as executive officer in USS *Iroquois*, a screw steamer which had just been recommissioned after a long period of inactivity at Mare Island Shipyard in California. During Stockton’s assignment on board, the ship cruised widely on the Pacific Station, ranging from ports in South America to Hawaii, Australia, and the Pacific Islands. At the very end of Stockton’s tour, the ship participated in the



American intervention in Panama, where revolution had blocked the free transit of the isthmus that had been guaranteed to the United States under a treaty with Colombia. On March 26, 1885, the USS *Galena* landed a force at Aspinwall, which was soon reinforced by units from *Shenandoah*, *Swatara*, and *Iroquois*. A force of Marines under Lieutenant Colonel Charles Heywood and sailors under Commander Bowman McCalla reopened the railway and maintained order while Colombian troops quelled the rebellion. Stockton landed with *Iroquois*' party. This personal experience of operations ashore during a civil war led Stockton to examine more deeply the diplomatic and international law issues surrounding naval intervention and American interests in a transoceanic canal.

Upon his detachment from sea duty, Stockton spent several months on leave in Phoenixville and then traveled to Washington, where he took up a three-and-a-half-year assignment in the Bureau of Yards and Docks. During this period he assumed a variety of duties and developed interests that stayed with him for the remainder of his life. Coming as he did from a family with a long-standing interest in charity and church work, he became a devout member of St John's Episcopal Church on Lafayette Square. He was also a member of the Board of Trustees of the Church Orphanage, and of the Board of the Navy Mutual Aid Association.<sup>16</sup> In the light of this background, it is not surprising that Stockton became particularly interested in one organization that came under the purview of the Bureau of Yards and Docks: the Philadelphia Naval Asylum, an early attempt to address the welfare of retired and disabled seamen. His interest in this subject led to his first two publications, a thirty-seven-page pamphlet on the study of the history, management, and function of the organization,<sup>17</sup> and a short article in the Naval Institute *Proceedings* on the Asylum's role in providing service pensions to enlisted men.<sup>18</sup>

Through this connection, he began to take an active role in the Naval Institute and its activities. Expressing one of his interests in a discussion group on the Prize Essay for 1887, he commented that there was a great need to bring Navywide coordination to the many requirements for education and training within the service.<sup>19</sup> Shortly afterwards, the Naval Institute asked him to be one of the judges for its Prize Essay contest in 1888.<sup>20</sup> Through these activities he quickly became known in the service as a writer and thinker, devoted to furthering professional development in the Navy.

Among his official duties as a lieutenant commander in Washington during the years 1885–1888 was serving on a board to examine naval drills and exercises, on another to review and revise the naval signal book, on a third to

select the site for a new timber dry-dock at Norfolk, Virginia, as well as on the board of examiners at the Naval Torpedo School. The dry-dock site-selection experience resulted in his second contribution to the *Naval Institute Proceedings*, an essay on the use of the Simpson method for constructing timber dry-docks in the United States, from their introduction at Boston in 1853 to the most recent one at St John's, Newfoundland, in 1884.<sup>21</sup>

For his own career, certainly one of the most significant temporary additional duty assignments was to be sent to the President of the Naval War College, Captain A.T. Mahan, in response to Mahan's request for someone from the Navy Department to lecture on "Commerce and Commercial Routes between Europe and the Pacific." Returning to Newport in 1887 for his first visit to the three-year-old Naval War College, Stockton spoke on the possible effects that a trans-isthmian canal would have on this trade, along with a survey of the political and military conditions in the Pacific, Gulf of Mexico, and the Caribbean regions. His lecture was very well received. Mahan and others at the College reported so enthusiastically about his performance that Rear Admiral Luce, then commanding the North Atlantic Station, wrote personally to commend Stockton for his "admirable lectures" and to ask him to save his notes so that he could repeat the performance in the following academic year.<sup>22</sup> With Luce's assistance, Stockton was able to improve his lectures further by obtaining the latest reports on facilities in the Caribbean and the Gulf.<sup>23</sup> Building on his own earlier experience in the USS *Iroquois* at Panama in 1885, Stockton produced a body of research on this subject to which he repeatedly returned in later lectures and writings; the historical, strategic, and commercial aspects of the Pacific and Central America became a subject of special study. He soon became known within the service as one of the Navy's foremost authorities on the Canal and the Caribbean area.<sup>24</sup>

Returning to Washington, Stockton resumed his duties with the Bureau of Yards and Docks. After serving on a board to consider costs for dry-docks at Brooklyn, New York, and Portsmouth, Virginia, he was assigned in November 1888 to a board established to find an appropriate site for a navy yard in Oregon or in the territories of Washington or Alaska. Stockton was the junior member of the three-officer commission, which included Commander Colby M. Chester and Captain Mahan, who was temporarily detached from the Naval War College to serve as its head.

Mahan, Stockton, and Colby traveled first to San Francisco and then north to Portland, the Columbia River, and Seattle to examine possible sites. Considering all the strategic and logistical issues involved for a naval base that would defend American territory above forty-two degrees north latitude, the



three commission members obtained the cooperation of a Coast Survey vessel to view, compare, and contrast a variety of possible sites. After careful consideration, they selected Point Turner—the site of the future Puget Sound Navy Yard.<sup>25</sup>

### Command at Sea

Toward the end of March 1899, just as the commission was completing its work, the Chief of the Bureau of Navigation telegraphed Stockton, “How soon could you take command of the *Thetis* and would you like that command?” At the time, the Scots-built former steam whaling ship was completing a five-month yard period at the Mare Island Naval Ship Yard, and her commanding officer, Lieutenant Commander William H. Emory, had orders to London as naval attaché. Accepting the offer immediately, Stockton reported that the commission had nearly completed its work and that he could report on board within a few weeks. Soon after Stockton arrived, a telegram arrived reporting that Emory’s orders might be canceled and asking whether Stockton would swap orders and take the USS *Pinta*, while Emory returned to *Thetis*. It was a chance that Stockton would not take, and he refused the offer.<sup>26</sup> On April 20, 1889, *Thetis* sailed out of San Francisco Bay with Stockton in command, to perform surveys in Alaskan waters and to protect American commercial and whaling interests in the Bering Sea and Arctic Ocean.

Later in 1889 *Thetis* called at several Eskimo villages. Deeply moved by his encounters with the native peoples of the North, Stockton recorded in his journal an episode of a visit to Cape Prince of Wales that reflected a contemporary outlook: “During the morning I had a conference with some [of] the leading natives. . . . Told them what I wanted to communicate . . . that they had a bad reputation, and that if they maltreated white men they would be punished, but if they treated white people who were ship-wrecked properly they would be rewarded.”<sup>27</sup> Appalled by the social conditions there and elsewhere in Alaska, he commented, “What a Pity nothing is done for the elevation of these people.”<sup>28</sup> In particular, he became interested in the Eskimo village of Tigara, near Cape Hope on the Bering Sea. “Although under the flag of the United States,” Stockton wrote in describing this place, “there was nothing but chaos and paganism.”<sup>29</sup> Acting on his reports, the Navy Department ordered Stockton to establish a house of refuge at Port Barrow. In connection with this duty Stockton wrote to the Board of Missions of the National Council of the Episcopal Church, urgently recommending that they send a missionary to the area. The Board of Missions was so impressed by

Stockton's direct plea that they immediately sent out Dr John B. Driggs, who would distinguish himself by many years of missionary service at Cape Hope.<sup>30</sup> In another initiative, Stockton arranged for the U.S. Department of the Interior's Bureau of Education to circulate fifty copies of printed Eskimo language vocabularies to missionary schools at Point Barrow, Point Hope, and Cape Prince of Wales.<sup>31</sup> In the course of these activities Stockton became deeply interested in the history of the region, and the Alaska Historical Society elected him an honorary member.<sup>32</sup>

Meanwhile, Stockton and his ship were also carrying out their primary duties. One of the most important of these was oceanographic and hydrographic survey work. On this cruise *Thetis* became the first U.S. government vessel to reach Mackenzie Bay in Canada. She made the return passage from Mackenzie Bay to Herald and Wrangel Islands in one season, which had never before been done, and became the first vessel of any kind to follow the entire coast of Alaska, from Port Tongass in the extreme southeast to Demarcation Point on the Arctic Ocean, the northern border between Canadian and United States territory.<sup>33</sup> In the course of this cruise, the officers of the *Thetis* made a careful examination of ice movements on the Bering Sea and in the Arctic Basin. Their work earned them special praise from the Hydrographer of the Navy, who in a circular letter to the entire Navy distributing the published results, reported that Stockton and his officers had greatly contributed to knowledge of the waters and coasts of northwestern Alaska and that "the recent cruise of the *Thetis* has been remarkable as it has been successful."<sup>34</sup>

After her five month cruise *Thetis* returned to Mare Island for a repair period before sailing to the Central American coast, still under Stockton's command. Stockton prepared an article on the Arctic cruise for the new *National Geographic Magazine* and another for *The Overland Monthly*, on the growth of the new Navy.<sup>35</sup> In the latter article Stockton revealed his fundamental belief in the need for a strong navy to maintain international law and to promote the peaceful settlement of international issues. While the idea of transferring issues of national dignity and self-preservation from the arena of war to courts of justice appealed to him, he also saw how monopolies and arbitrary trusts had used bribery and corruption to defend themselves in domestic courts. "Arbitration is practiced between equals," he wrote; "a stronger power with a wrong to redress or an aggressive policy to enforce will not stop for measures of arbitration."<sup>36</sup>

Meanwhile, a revolution had broken out in El Salvador; the government of Francisco Menéndez had been overthrown by the army commander, General



Carlos Erzeta. The revolutionaries had driven the forces of the government into Guatemala, and war had broken out between the two countries. Stockton's assignment was to cruise the coasts of Guatemala and El Salvador and protect American interests from harm. In the course of this duty between July and October 1890, Stockton and *Thetis* called several times at La Libertad and Acajulta in El Salvador, at La Union and Ampala in Honduras, and at San José in Guatemala. Praising Stockton's work, the American envoy in Central America, Lansing Mizner, valued the ship's presence "in the critical juncture of the [official] mediation on the part of our Diplomatic Corps to restore peace to the hostile republics of Guatemala and Salvador."<sup>37</sup> Assistant Secretary of the Navy James Soley forwarded to the Secretary of State his own praise for Stockton's success in "obtaining redress from the government of Salvador for the indignation offered to the U.S. flag in the capital of that country."<sup>38</sup> Upon returning from Central America for a repair period at the Mare Island Naval Shipyard, Stockton received orders to report for shore duty at Newport, Rhode Island.

### The Naval War College

When Mahan had been detached on temporary duty from the Naval War College in January 1889 to head the commission that selected the site for the Puget Sound Navy Yard, those who favored technical training over the education in political-military affairs being offered at the College had taken advantage of his absence. For the moment, the Naval War College's strongest and most effective supporters were all exiled. Mahan's departure for the distant northwest coast came at the exact moment that the founder of the College, Rear Admiral Stephen B. Luce, retired from active duty after serving as commander in chief of the North Atlantic Squadron. In the last months of President Grover Cleveland's administration, Secretary of the Navy William C. Whitney ordered the Naval War College course shortened and recommended to Congress that it be consolidated with the Naval Torpedo School on Goat Island under the Bureau of Ordnance. Such an attempt to subject the broad political-military interests of the College to the scientific and technological concerns of submarine ordnance was clearly a plan to kill the Naval War College. Its opponents could see no practical value in an educational institution that focused so strongly on history, case studies, and theory, encouraging its faculty and students in independent and creative thought, and providing them large amounts of free time, without specific assignments or detailed work plans, to undertake individual reading and

writing in broad areas of professional interest. Acting in effect to replace this approach with the type of lectures used for basic technological training, transmitting large amounts of information through rote learning, the Navy Department even moved the College from its original home on Coaster's Harbor Island to nearby Goat Island, where the Torpedo Station was located. To consolidate its position, the Navy Department persuaded the outgoing Congress in its very last days in March 1889 to allocate \$100,000 for a new, purpose-built building on Goat Island for the joint use of the College and Torpedo School. In the eyes of the Naval War College's supporters, this move clearly spelled its end.

The orders were given and duly carried out. However, as chance would have it, the ordnance officer in charge of the Torpedo Station, who would have been expected to kill the College by amalgamating it into the Station's technical work, happened instead to be an ally. He was not only a personal friend of Admiral Luce's, but the very officer whom Luce had chosen five years before as the junior member of the board that had created the Naval War College, selected its original site, and established its first curriculum in 1884: Commander Caspar Goodrich. As he recalled many years later, the College "fell in friendly hands, and I made a point of honor of keeping it alive."<sup>39</sup> With a good friend on the local level to maintain breath in the institution, Admiral Luce turned his attention to the state and national level, working to gain support for the College. In particular, he enlisted the strong support of Rhode Island Senator Nelson Aldrich, while making appeals to key members of President Benjamin Harrison's incoming administration.

Five days after Harrison's inauguration, the new Secretary of the Navy, Benjamin F. Tracy, promised Aldrich his support. In his first annual report to Congress, Secretary Tracy declared that further direction from Congress was needed before construction began on the new Goat Island building. "The present condition of things," he wrote, "in which the college is made as sort of an appendage to the Torpedo Station, under the Bureau of Ordnance, should be corrected. It is attaching the greater to the less."<sup>40</sup>

Because the situation for the College was unclear, the Navy Department ordered no students or faculty to the College for the 1890 or 1891 academic years. Goodrich remained nominally in charge while Luce and others worked to reverse the previous administration's policy. In May 1890, as support for the College grew, Mahan published his Naval War College lectures as *The Influence of Sea Power upon History, 1660-1783*, bringing widespread attention to the fruitfulness of the College's first years. Shortly thereafter, in June 1890, Congress passed an important appropriation bill authorizing the *Indiana* class of



battleships. At the same time, Congress took two additional steps that soon had an important effect on the Naval War College. First, it authorized the return of the College to Coaster's Harbor Island and the construction of the new building there. Secondly, it revived the post of Assistant Secretary of the Navy, a position that had lain dormant for the nearly thirty years since Gustavus Fox left office after the Civil War, and it placed the College directly under the Assistant Secretary. To fill this new position Secretary of the Navy Tracy appointed James R. Soley, who had been the first civilian faculty member at the Naval War College and, from 1885 to 1888, its first lecturer in international law. In this key position, Soley became the College's most important promoter and defender.

The Navy Department ordered Charles Stockton to supervise the construction of the first new building for the Naval War College, under the Commandant of the Naval Training Station, Captain F.M. Bunce. Reporting for duty in August 1891, Lieutenant Commander Stockton was soon directed to take charge of the entire War College Department and to transact all its business.<sup>41</sup> Construction began on September 14, 1891, and was finished on May 23, 1892. Upon completion of the building that (forty years later) would be named Luce Hall, Stockton and his family became its first residents, moving into quarters in the southeast corner of the building.

In February 1892 the Navy Department ordered Mahan to return as President of the College, but he preferred to remain at his home in New York City, where he could complete work on his next series of lectures that would constitute his forthcoming book, *The Influence of Sea Power upon the French Revolution and Empire*. Stockton remained in Newport in direct charge of the College's affairs until Mahan returned in July 1892 to open formally the academic year. Recalling the situation from his own point of view, Mahan would later write in his reminiscences, "the College slumbered, and I worked."<sup>42</sup> In fact, Mahan was largely oblivious to what was going on in Newport, and Stockton carried out all the practical affairs of the College with Mahan's blessing. While Mahan researched and wrote, Stockton oversaw construction of the College building and handled all its numerous administrative affairs. Continuing the close relationship they had developed during the Puget Sound Commission, Mahan and Stockton worked very effectively and cooperatively together. Thinking back on these years, one of Stockton's daughters recalled that the two men made an odd sight together—her father being "rather short and square, while Captain Mahan loomed immeasurably tall and thin above him."<sup>43</sup>

In his opening address to the first group of students in the new building, Mahan presented a carefully worked out defense of the College and its educational approach. With the new battleships under construction, he pointed out, broad theoretical and historical studies had concrete importance now. "There is time yet for study; there is time to imbibe the experience of the past," he said. "Use the time of preparation for preparation. . . . To postpone preparation to the time of action is not practical."<sup>44</sup> Handing the administration over to Mahan, Stockton returned to being a lecturer, revising and updating the lectures he had first given at the College in 1887 and 1888 on the subjects of "Naval, Commercial, and Political Conditions existing in the region affected by the [future] Inter-Oceanic Canal and the problems resulting therefrom," and "The Strategic Features of the Pacific."<sup>45</sup> Due to the heavy criticism the College had received and was continuing to receive, both Mahan and Stockton were careful to keep the College lectures focused on specifically naval affairs. They initially refrained from emphasizing the broader issues which led into the full consideration of military affairs and international law. While such matters were made clear during the War College course, the faculty was cautious in the way it presented them at the College, knowing that the campaign to save the College was not yet over.

In May 1893 Mahan departed from the Naval War College to take command of the cruiser USS *Chicago*, leaving Stockton as acting President of the College. Having been promoted to the grade of commander less than a year before, he was—and still is, a century later—the most junior officer to ever hold the position. Stockton immediately continued the work of Luce and Mahan in defending the College. In an article for the *Naval Institute Proceedings* Stockton outlined the full rationale for the College, following Mahan's opening lecture a year before. Surveying the broad importance of studying such subjects as strategy, tactics, and naval history, Stockton added, "One of the most important of these specializations is that of international law, taught with fullness nowhere else, and whose practical utility to the Navy is daily demonstrated."<sup>46</sup>

The struggle to reestablish the College had created bitterness within the naval officer corps, and as a senior officer to take up its presidency Secretary Tracy wanted someone who could forward its goals but lacked the stigma that attached to its most strident supporters. He eventually settled on a Captain Henry C. Taylor, who had lectured at the College in 1885 and who had served at sea under Luce as commanding officer of the training ship USS *Saratoga* in 1880-1884. A widely respected officer, Taylor fully understood Luce's vision for the College but was not associated with the recent political battle.



Becoming the new President of the Naval War College in November 1893, Captain Taylor made a number of innovative changes to the curriculum. All of them stressed the traditional method of inductive reasoning, which the College had employed in its teaching since its founding. In the area of international law, the College invited Professor Freeman Snow of Harvard University to deliver a series of twenty-two lectures during the 1894 course, to parallel the students' consideration of hypothetical cases of naval warfare, and to be published later as a manual for naval officers. Snow had been one of the pioneers in the case method of teaching international law at Harvard Law School. At that point there was no American textbook which used this method, and Snow had begun to develop one.<sup>47</sup> He already had a connection with the U.S. Navy, having lectured at the Naval Academy in Annapolis as early as 1884.

In preparation for Snow's lectures Stockton laid out courses of reading in the subject<sup>48</sup> and wrote him suggesting topics and approaches. Stockton remarked, "These memoranda are based upon the experiences of naval officers graduated from the Naval Academy after a brief and elementary course at the Naval Academy, either of Kent or Wheaton, or in later days of Woolsey and Glass." Obliquely referring to his own early experience, he continued, "A foreign cruise is apt to follow after graduation and the cadet or ensign as boat officer may readily blunder in international law by chasing deserters through a foreign city, or using force in the streets to confine drunken seamen of his ship."<sup>49</sup> Providing five pages of examples, Stockton gave Snow a clear picture of the types of issues and problems that a highly experienced naval officer often encountered in international law. Stockton emphasized to Snow the need for naval officers to understand the complicated interrelationship between naval, diplomatic, and consular affairs, as well as their connections to larger political, ethical, and moral questions. For instance, he pointed out, "questions concerning missionaries constantly arise. What protection are they entitled to—not as missionaries—but as Americans?" Again,

Suppose a servile insurrection or the rising of a class of coolies or laborers who are degraded and savage. How and when does common humanity require action to save lives of white men and their innocent families—masters, overseers and employees? How justifiable is it and to what extent may be carried the landing of a force to protect legations and consulates?<sup>50</sup>

Drawing further on his own extensive experience, he asked, "What jurisdiction has a man-of-war over the natives of northern Alaska—for the enforcement of laws in localities, for the protection of traders and schools?" Nor did he forget

the law of warfare: bombardment of commercial towns in wartime, contraband, neutrality, stoppage of breadstuffs and food supplies to a nation whose supply is seaborne, telegraphic communications in wartime. "Besides broad outlines of principles from which knowledge unexpected cases must be met, what I have referred to above may be considered an illustration of what would be needed in a course of lectures before officers of experience and years."<sup>51</sup>

For undertaking the series of lectures that Stockton outlined for him, the Naval War College paid Snow a thousand dollars. However, just as he was completing his course, Snow suddenly died. At the time, Stockton was giving his own series of lectures on other topics at the College, repeating his lecture on the Interoceanic Canal that he had given in 1887, 1888, and 1892.<sup>52</sup> Thereafter he developed a number of new themes: preparation for war, contemporary French and British sea power, maps and charts for war, combined maritime expeditions, and operations in the war of 1812. Two presentations, on commerce destroying and on sea blockade, touched on issues of international law.<sup>53</sup> In addition to these wide-ranging lectures, Stockton now arranged the first discussions on situations in international law; the College published the result as a twelve-page pamphlet, including Stockton's discussion of the situation.<sup>54</sup> Stockton's innovative work in creating and publishing international law situations for naval officers to examine and to consider eventually matured in 1901 as the International Law Studies ("Blue Book") series, of which this volume is the seventy-first.

At the end of the 1894 course Stockton was assigned to special duty, to pick up where Snow had left off, editing his work for publication and expanding on it where needed. By the time the manuscript was completed at the end of 1894, Stockton had written three-quarters of the book, but he modestly attributed it to Snow.<sup>55</sup> When the Government Printing Office published the work in 1895, it became the College's first book-length publication in the field of international law.<sup>56</sup> In the preface, Stockton made a special acknowledgment to Professor S.U. Macvane of Harvard for his assistance and suggestions in arranging Snow's material. Thanking Stockton cordially for this generous compliment, Macvane wrote to him, "You overstate my share in the matter, however. I wish I had a small corner, somewhere between the covers, to tell how completely the book is your own work."<sup>57</sup>

In March 1895 Stockton completed a report for the Office of Naval Intelligence on "Strategic Features of the Maritime Provinces of Canada with a special view to naval or combined operations on the part of the US."<sup>58</sup> Later that same year, Stockton gave his first full series of lectures on international law, largely following the book he had just published.<sup>59</sup> In it Stockton, as he had

done in the previous year, set forth a series of international law situations, posing specific cases for students to discuss and resolve. The proceedings of these discussions, with notes by Stockton, were published as a small pamphlet by the College in 1895 and distributed with the College's *Abstract of the Course*, 1895.<sup>60</sup>

### Return to Sea Duty

Detached from the Naval War College in July 1895 immediately after completing his series of law lectures, Stockton took command of the steel-hulled, twin-screw gunboat USS *Yorktown* on the Asiatic Station. Stockton traveled first to Japan and then on to Korea, where he found his ship at Chemulpo (Inchon). He took command on October 22. Shortly before, the Korean government had been overthrown, and Stockton's predecessor had sent an officer and a group of seaman guard to Seoul; Ensign Knepper and his fifteen men were stationed at the U.S. Legation. Upon taking command, Stockton went to Seoul to inspect the guard, confer with American diplomats, and have an audience with the Korean King, Yi Hueng.<sup>61</sup> In early December President Cleveland's Secretary of State, Richard Olney, put an end to these activities, issuing instructions directing American naval officers and diplomats to refrain from interfering in the domestic politics of a friendly State.<sup>62</sup>

For the remainder of his period of command Stockton cruised in *Yorktown*, showing the flag in various ports in China and Japan. Toward the end of his tour of duty the Commander in Chief, Asiatic Station, Rear Admiral F.V. McNair, made a formal inspection of *Yorktown*. In a detailed and extremely favorable report, McNair concluded that Stockton's "officers and men are zealous and (with good reason) are proud of their ship"—a report which earned Stockton a personal "Well done!" from Acting Secretary of the Navy Theodore Roosevelt.<sup>63</sup> In the fall of 1897 *Yorktown* sailed from Japan for San Francisco. Laying up and decommissioning the ship at Mare Island Naval Ship Yard in December 1897, Stockton returned to Newport and the Naval War College, expecting to resume his duties as lecturer in international law.

### Presidency of the Naval War College

The College was not in session during the winter of 1897-1898, when Stockton returned to the study of international law, but this did not slow his work in the subject. At the invitation of Allan D. Brown, president of Norwich



University in Northfield, Vermont, Stockton delivered a course of lectures to students there. In appreciation of his effective presentation the Executive Committee of the Board of Trustees appointed him the University's "Lecturer in International Law (to have no compensation at present)."<sup>64</sup> Shortly thereafter, with the outbreak of war with Spain in April 1898, the Navy Department suddenly ordered to sea without relief the President of the College, Captain Caspar Goodrich (who had helped save the College in 1889-1890). In his place the Navy Department ordered Commander Stockton to assume duties as officer-in-charge, under the Commandant of the Newport Training Station. Due to the war, the Department suspended plans for the forthcoming class. There was little activity at the College during those months, but those connected with the College in Newport followed current events carefully. In early June 1898 Stockton was thinking about the sequel to Dewey's victory at Manila Bay even before the USS *Charleston* captured Guam on June 20, 1898. Reflecting on the strategic importance of the Mariana Islands in terms of their relationship to the sea lines of communication across the Pacific, Stockton wrote to Admiral Luce, "If we secure or retain a coaling station in the Philippines we would have San Francisco or the trans-isthmian canal to Honolulu, Honolulu to Guam, and Guam to the Philippines, the entire stretch across the Pacific with American stepping stones in the way of coaling stations. The north Pacific is our sphere of influence by divine right."<sup>65</sup>

Later in June 1898 the Department ordered Stockton to prepare a revised edition of Snow's lectures, since the widely read first edition of 1895 was already out of print and a new and updated edition was urgently needed in the fleet. By August, however, the war with Spain had ended, and the Navy Department was taking no action to revive the College; by all reports, the enemies of the College and its work were once again seeking to destroy it. Theodore Roosevelt had been a strong supporter of the College, but there were rumors that his successor as Assistant Secretary wanted to move the College to Annapolis, creating a "Naval University" there. Luce, Mahan, and others returned to take up the battle, arguing the inappropriateness of such a move. Meanwhile, Stockton continued his studies on international law. To obtain the most up-to-date information he wrote to each of the Navy's fleet commanders at sea, including George Dewey and W. T. Sampson, asking them for their views on improving and enlarging the manual of international law based on Professor Snow's lectures.<sup>66</sup> Completing this revision on 21 October 1898, Stockton sent the manuscript to Washington for publication by the Government Printing Office.<sup>67</sup>

Shortly after, the Navy Department issued him orders in November 1898 appointing him—still a commander—President of the Naval War College. With the institution once again at a critical juncture, Stockton moved quickly into action, sending letters to a wide variety of influential people arguing that a move to Annapolis would be fatal to the intellectual purposes of the College. Its location away from the political influences of Washington and within reach of key universities and libraries were the main points of his argument, but also noted, “The climate of Newport is conducive to mental labor all the year, which cannot rightly be said of Annapolis.”<sup>68</sup> Winning support for his cause in Congress, Stockton was able to keep the College in Newport despite strong opposition within the Navy Department. Thwarted, the Department nevertheless refused to assign any officers as students to the College, arguing that they could not be spared from sea duty and other more important shore assignments. Stockton expressed his strong objections to the Assistant Secretary of the Navy:

I beg leave to express my regret that it is not considered practicable, from the present outlook, to establish a course this coming season at the College. This, however, is but secondary to the more serious fact that the Department considers the study of naval warfare at this institution outside the regular work of the service. In no other country is such professional work considered secondary to the inspection of lighthouses and the inspection and manufacture of materiel.<sup>69</sup>

Stockton turned to an old friend of the College, Rear Admiral William T. Sampson—now commander in chief of the North Atlantic Fleet—who had been, with Caspar Goodrich, on Luce’s original board to establish the College. Stockton persuaded him to have the North Atlantic Fleet rendezvous in Narragansett Bay and so arrange his ships’ schedules that fleet officers could attend an abbreviated course of lectures from May through October 1899.

In years past the Assistant Secretary of the Navy had usually come up from Washington to give the opening address to students, but without support from the Department, Stockton was faced with giving the address himself.<sup>70</sup> The main subject of interest during the course was an examination and critique of American operations in the War with Spain, but Stockton made sure that both naval history and international law were included. His opening address on “Preparation for War” was published and distributed to the service,<sup>71</sup> as was his unsigned commentary on the international situations examined during the course.<sup>72</sup> He himself also gave additional lectures on “The Action off Beachy Head in 1690,” an account of English joint operations directed against Puerto Rico and Cuba in the sixteenth through eighteenth centuries, and on the legal



aspects of "Submarine Telegraph Cables in Wartime."<sup>73</sup> His lectures gained strong support from fleet officers for the College, which played an important role in thwarting the effort to move it to Annapolis. Ultimately the Department met the interests of those who had opposed the College in another way, by establishing a graduate program in engineering at Annapolis.

During this period the subject of international law remained on Stockton's mind and he began to consider the possibility of a follow-on to Snow's lectures—what he described to the Secretary of the Naval Institute as "a separate work in the future upon maritime international law," a book-length study that would encompass the full range of the subject.<sup>74</sup> To his knowledge, nothing existed in English comparable to the works by Carlos Testa in Portuguese<sup>75</sup> and Captain M.F.T. Ortolan in French.<sup>76</sup> In the meantime, however, he forwarded his lecture on the law of submarine cables to the Naval Institute for publication.<sup>77</sup>

Shortly thereafter he sent to the Naval Institute another Naval War College lecture, this one on a future inter-oceanic canal.<sup>78</sup> In it, Stockton emphasized the negative effects that the 1850 Clayton-Bulwar treaty had had for the United States. He argued that this policy needed to be changed and that the United States had the clear right to build, protect, and fortify its own canal. In addition, he argued that analysis of the strategic geography of the Caribbean pointed to the importance of the Windward Passage, between Cuba and Haiti, as the most important avenue for access to the canal. "One cork is alone necessary for this bottle,"<sup>79</sup> Stockton wrote. Despite the title of his article, Stockton did not see his subject in narrow geographical terms but linked it to broad global policy for the United States. He suggested that if the United States wanted to develop a sphere of influence, a naval station in Korea or in northern China was equal in importance to that in the Philippines. He acknowledged that such a base had many drawbacks: it would require many years to link it to any important commercial enterprise, and a very large naval capacity might be required to maintain it. He concluded,

The questions that will arise about the Canal will be almost exclusively maritime and with the great naval powers. To meet these powers with any tone of strength or pretension of equality in these matters we must have a competent naval marine; or otherwise we will experience those interpretations of international law that are reserved for less vigorous nationalities and weaker naval powers.<sup>80</sup>

On Mahan's suggestion, Stockton took up the issue of the capture of enemy merchant vessels at sea. Charles Henry Butler had recently published an open letter to Mahan in the widely read *North American Review*, criticizing the



military value and effectiveness of capturing privately owned vessels and cargoes. With the thought of presenting a full view of the subject from the point of view of a belligerent who is aware of the practice and principles of international law, Stockton replied in the same journal. He argued that in the case of the major commercial nations of the world, private cargoes and vessels had a direct connection to the ability of an enemy to conduct warfare. Thus, he believed, their destruction had merit as a military measure and should be dealt with as such; at the same time, however, he was opposed to the payment of prize money. Stockton turned once again to Richard Henry Dana's argument that the sea was *res omnium*, the common field of war as well as of commerce.<sup>81</sup>

### A Naval War Code

While Stockton was writing and dealing with these varied issues, he received his promotion to the grade of captain. Shortly after the academic course ended at the Naval War College in October, the Judge Advocate General of the Navy forwarded to Stockton for comment an unofficial letter to the Secretary of the Navy from Lieutenant Commander William W. Kimball suggesting that the Navy Department issue an authoritative and mandatory code or manual to cover all cases of international law that occur in the experience of a naval officer. While Stockton agreed with Kimball's suggestion that it would be desirable to have such a manual, he had considerable doubt about the practicality of producing one. "International Law is a plant of slow growth," he wrote, "and its usages must be commonly and internationally accepted. Precedents from our departments are materials for future rules rather than present ones and it is worse than useless to promulgate as rules anything which is not regarded and accepted as such by other nations."<sup>82</sup> A rule, he pointed out, no matter how comprehensive it seems, can not possibly cover every case or situation. "If officers are trained to rely upon the text of concise and crystallized rules, without reference to the spirit and principles behind them, I believe they will be worse off than if they relied upon the principles and precedents alone and their native intelligence."<sup>83</sup> In Stockton's view, the best way to achieve the goals that Kimball suggested was to ensure that officers studying at the Naval War College were well grounded in the broad principles of international law, through individual study of the treatises on the subject as well as by hearing lectures and studying cases that showed the prevailing usage. This, he pointed out, was the purpose behind the College's publication of international law situations and solutions.

While Stockton found most of Kimball's suggestions impractical, he seized on one point: "the preparation of regulations upon the laws and usage of war upon the sea."<sup>84</sup> Pointing out the precedent of the instructions for the regulation of land warfare that Dr. Francis Lieber had prepared for the U.S. Army during the Civil War, Stockton noted they had been "epoch making and redounded greatly to the credit of the author, the war department and the country."<sup>85</sup> Although they had been designed for the United States Army alone, they had become the model for similar codes in other countries, and in 1880 the Institute of International Law had used them in formulating a code of the law of war on land for universal use. The Navy, however, had nothing of so comprehensive a nature, only a set of French instructions in 1870 and the U.S. Navy's General Order 492 of 1898, which dealt with some of the issues that should be included. The time was ripe to remedy the situation. "The results of the Hague conference give new matter for such a code of instructions," he wrote.

Now that we are at peace with the outside world the time would be an excellent one to draw up in accordance with the advanced humanity of the times, a code that would lead the world. As these instructions would not require any international action, and are directed to our own service, they would be undisputed authority, providing always they are in accord with definitely established international law and usage and the dictates of humanity.<sup>86</sup>

Within a week after sending this letter, Stockton received direct orders from Secretary of the Navy John D. Long, dated November 2, 1899, directing him to prepare a draft comprehensive code, elaborating on the legal conventions established in the recent Hague Conference and embodying the laws of war at sea. Upon completion of this work Stockton was to submit it for approval to Washington. Stockton replied to Secretary Long with characteristic modesty:

In acknowledging the receipt of this order, I cannot but state that my deep appreciation of the importance and responsibility of this duty, and the demands which it makes, leads me to enter upon it with some reluctance, but as the matter comes before you for final revision and approval, I trust that in its final shape the necessary high standards will be met.<sup>87</sup>

Stockton wrote immediately to Lieutenant Commander Kimball, who was well known at the Naval War College as an outspoken pioneer in the employment of torpedo boats and submarines. Additionally, in 1894–1897, the period leading up to the Spanish American War, Kimball was in the Office of Naval Intelligence; during those years he had worked closely with the Naval



War College on the Navy's basic war plans and strategy for that war. In his letter, Stockton asked Kimball for any further suggestions he might have, adding the hope that he might agree to be assigned to the College while this work was in progress. It would, Stockton wrote, "take some time, because if done, it should be done properly and exhaustively, and the field is a virgin one."<sup>88</sup> Kimball, however, had only recently reported for duty as Ordnance Officer at the Norfolk Navy Yard, and despite Stockton's encouragement it would be June of 1901 before he could get orders to the Naval War College as a student.

Seeing the new project as a vehicle to promote and to solidify the College as well as to make an important contribution to international law, Stockton asked the Secretary of the Navy for additional staff, arguing that he needed to be relieved of administrative burdens to carry out this important task. Stockton also requested a travel allowance so that he could consult professors at Harvard and use the international law library of the Boston Athenaeum, which he considered "especially valuable." In addition, he requested the Secretary to direct the Surgeon General of the Navy to give his views on the care of sick and wounded, and to ask the Secretary of State to provide to Stockton all the official discussions, proceedings, and findings of the recent Hague Conference.<sup>89</sup> Building on the materials already available in Newport, he further requested the Navy's Judge Advocate General send him copies of all "published or unpublished codes of the laws of war upon sea or land, authorized or in use by any of the European or civilized powers."<sup>90</sup> In addition, he asked permission to travel to New York to meet with Mahan, who had been a delegate at The Hague Conference, and to have discussions with Professor John Bassett Moore of Columbia University, whom he characterized as "a successor of Dr. Lieber at that institution."<sup>91</sup> Within a few weeks Stockton's requests were granted, and he was hard at work on the project to write a code of naval warfare.

By February of 1900 Stockton had reached a point where he needed the U.S. Army's current view of The Hague Convention.<sup>92</sup> Working rapidly, by spring Stockton had completed a first draft of the full Code, which he circulated for comment to three naval officers: Admiral of the Navy George Dewey,<sup>93</sup> Captain A. T. Mahan, and Captain Asa Walker. Walker, who was then the next senior staff member at the Naval War College and had commanded the USS *Concord* with distinction at the battle of Manila Bay, provided Stockton with much valuable, practical advice in connection with combat operations.<sup>94</sup> In addition, Stockton solicited comments from several academics: Thomas S. Woolsey of Yale, John Bassett Moore of Columbia, K. H. Strobel of Harvard, and George Grafton Wilson of Brown University.<sup>95</sup> Collating their comments

and obtaining their approval of his work, Stockton submitted the draft to Secretary of the Navy Long on May 19, 1900.<sup>96</sup>

In forwarding to the Secretary of the Navy the draft of his proposed regulations concerning the law and usage of war at sea, Stockton explained that he intended it primarily to be put in force by the U.S. Navy. For that reason and taking account of existing American laws, he included articles relating to privateers, letters of marque, and the capture and destruction of enemy property at sea. If, however, the law was to be subjected to international discussion, then these articles could be omitted, in view of American adherence to the Declaration of Paris during the War with Spain and with the recent American position at The Hague Conference.<sup>97</sup>

In his letter to the Secretary, Stockton summarized the value of this work:

In addition to the manifest advantages of a formulating and crystallization of the laws and usages of naval war (a work that has never before been attempted, it is believed, by another nation), it is also hoped that this code will tend toward the amelioration of the hardships of naval warfare in general, and more particularly in the following respects:

1. By the adoption of all that is of practical value to be found in the additional articles proposed at The Hague to extend the articles of the Geneva Convention to maritime warfare.
2. By restriction to the narrowest limits the bombardment of unfortified and undefended towns.
3. By defining the status of submarine cables in wartime.
4. By forbidding bombardment as a means of ransom upon undefended towns.
5. By forbidding the use of false colors.
6. By forbidding reprisals in excess of the offense calling them.
7. By exempting coast fishing vessels from capture, where innocently employed.
8. By incorporating the liberal allowances for vessels of the enemy at the outbreak of war, and for blockaded vessels, given in the General Order No. 492, of the Navy Department.
9. By providing definitely that free ships make free goods.
10. By giving all the exemption possible to mail steamers in time of war.



11. By exempting neutral convoys from the right of search.
12. By promulgating the general classification of contraband of war in such a manner as to make an international adoption of the principles possible.
13. By authorizing the use of the regulations for land warfare, whenever applicable to the Naval Service of the United States. This has not been heretofore officially done.<sup>98</sup>

During May and June 1900 the Secretary of the Navy circulated the draft Code in Washington. Officials at the State Department and the Navy Department suggested some changes and clarifications to the original draft, most of which Stockton accepted.<sup>99</sup> The only suggestion he refused was related to Article 22, on privately fitted-out hospital ships, which in the draft was a close translation of Article 3 of the recently concluded Hague Convention.

On June 27, 1900, in General Order 551, Secretary of the Navy Long issued the Code to the US Navy as a twenty-seven-page pamphlet "approved by the President of the United States."<sup>100</sup> On Stockton's recommendation, the Navy Department ordered the Government Printing Office to prepare a thousand copies of the Code, with six hundred copies to be distributed to officers of the service, two hundred copies for the future use of the Naval War College, 175 to naval stations and libraries, and twenty-five to be distributed directly by the Secretary and Assistant Secretary of the Navy.<sup>101</sup> By July Stockton had finished correcting the proofs,<sup>102</sup> and a month later he was able to send ten copies to foreign naval attachés serving in Washington.<sup>103</sup>

Within a year it began to be favorably noticed overseas. The naval correspondent of *The Times* of London wrote, "This little Code of Laws deserves to be noted as another product of the United States Naval War College, to which we owe Captain Mahan's work on sea power."<sup>104</sup> The Code also began to attract attention within the United States. By early October 1900 the Navy Department was beginning to receive a number of requests from the public for copies. Up to that point both the Navy Department and the College had supplied copies in response to a growing number of requests, but since general distribution outside the service had not been contemplated, there were not enough copies to continue doing this. The College had already distributed five hundred copies to all naval officers from the Admiral of the Navy down to the middle of the lieutenant seniority list; shortly after, the Superintendent of the Naval Academy requested 125 for use in teaching cadets. With the supply so low, the War College recommended that another a thousand copies be printed immediately and that the Academy's order be delayed until they were

available. Nevertheless, with only 141 copies remaining, the Navy Department directed Stockton to supply one hundred copies to the Naval Academy.<sup>105</sup> As interest continued to grow in the subject, Stockton recommended to the Navy Department that it obtain a thousand copies of Lieber's *Instructions for the Government of Armies of the United States in the Field* and distribute them as a supplement to his *Naval Code*.<sup>106</sup>

Soon after completion of his work on the code of naval warfare, the Naval Institute asked Stockton to submit a paper for publication. He sent them a paper that he had read before the Military and Historical Society of Massachusetts on a subject that had also been the topic of an earlier Naval War College lecture: "An Account of Some Past Military and Naval Operations Directed against Porto [sic] Rico and Cuba."<sup>107</sup> Surveying six English operations, ranging from Hawkins and Drake to the eighteenth century, Stockton pointed out that only two had been successful. In concluding his essay, Stockton linked, as is the hallmark of the Naval War College, the study of naval history with current events: "I trust that there are other teachings in such historical accounts than that of self congratulation. The obligations that have arisen with our new dependencies are greater than any strength that arises from them, and it is well to study the necessities that will arise from their maintenance and defense."<sup>108</sup>

In March 1900, Stockton became the first as President of the College to take up the new additional responsibilities that came with the establishment of the General Board, a permanent body of senior officers tasked to provide professional advice to the Secretary of the Navy on naval operations and policy. As originally constituted, the Board was chaired by Admiral of the Navy George Dewey and included the Chief of the Bureau of Navigation, the Navy's Chief Intelligence Officer and his assistant, the President of the Naval War College and his assistant, and three additional officers to be selected.

By the summer of 1900, however, Stockton had intimations that he would soon be sent to sea. Thus, the Naval War College course of 1900 was Stockton's last as its President. During the course, Stockton joined Mahan and others in giving lectures that year. He gave the opening lecture that introduced students to the purpose of the course, later lecturing on "The Formation of War Charts" and finally on international law, in a series of nine lectures. In addition, he compiled the notes and commentary to the Annual International Law Situations, of which a thousand copies were printed and distributed to the service.<sup>109</sup>

Relieved as President of the College by Captain French Chadwick on 25 October 1900, Stockton remained assigned to the Naval War College on special duty. In this capacity, he and his family went to New York City, where



Stockton began to compile cases in international law that in his judgment were of special interest to the naval service, but that Freeman Snow had not already included in his 1893 volume of *Cases and Opinions*.<sup>110</sup> In particular, he focused on gathering precedents and cases from recent experience in the Sino-Japanese, Spanish-American, and South African wars,<sup>111</sup> as well as some current topics from his own experience: American jurisdiction in the Bering Sea, cooperation of civilized powers in non-Christian and semi-civilized countries, submarine cables, blockade, and the arrest of deserters. The Naval War College staff arranged and published Stockton's compilation (with some further additions) in 1904.<sup>112</sup>

On Stockton's advice, his successor at the Naval War College moved to promote the further study of international law in Newport. Citing Stockton's work during the course given in 1900, Chadwick urged that the Navy employ a highly qualified instructor in the subject,

in order to make the work here not merely instructional, but developmental, by throwing the work of thought to a great degree upon the officer himself. Ordinary lectures in international law are, to officers who have been dealing with the subject more or less during their careers (which in the case of some who have attended have extended over forty years) ineffectual means in the development desired, unless they deal in the newer aspects of the subject, as was the case of some delivered last summer [with a series of lectures on "Insurgency" by George Grafton Wilson].<sup>113</sup>

Stockton took the lead in researching new material for the College's use, while Chadwick moved away from the passive lecture format and replaced it with an active approach, using creative research and problem-solving. In New York Stockton had persuaded John Bassett Moore of Columbia to take up the position Chadwick had announced, and the Naval War College employed him for this purpose at a thousand dollars a year.<sup>114</sup> Moore agreed with the method of situations and discussions as a means to "create a much greater personal on the part of the officers upon whom will be thrown the burden of personal research." Chadwick wrote, "This method involves a decided stimulus of emulation and interest such as mere lectures cannot give."<sup>115</sup> Chadwick also requested additional funds to purchase books for the Naval War College library, to obtain additional lectures on special topics in law, and to distribute printed versions of the lectures and situations. "Action of the kind mentioned," Chadwick wrote, "would tend to link the college with the universities of the country and place the service in greater sympathy with our more thoughtful men: a thing from every point of view much to be desired."<sup>116</sup>

At the same time, the College found that Stockton's work, both in his *Manual of International Law Based on Snow's Lectures* and his *A Naval War Code*, was in such high demand that the College President urged the Navy Department to authorize immediate new editions of both works.<sup>117</sup>

### Battleship Command

Completing the draft of his compilation of international law cases for the Naval War College, Stockton then wrote a short article for *Forum* on the "Laws and Usages of War at Sea"<sup>118</sup> before heading off for sea duty in the Pacific. Traveling to California by rail, he took passage across the Pacific. In Hong Kong harbor on March 11, 1901, Stockton took command of the eleven-thousand-ton battleship USS *Kentucky*, which had arrived from the United States on her maiden voyage only a few weeks before. In the previous year the U.S. government had drawn down naval forces in that area, decommissioning its heavy units in the western Pacific; the arrival of the *Kentucky* in the Far East indicated a clear change of policy in Washington,<sup>119</sup> and Stockton's assignment to command that ship was clearly a mark of approval from the Navy Department. Stockton wrote to his friend and successor at Newport, French Chadwick, of his arrival in Hong Kong and his first sight of his new command. Chadwick replied, "I am glad that you like your ship. You could, of course, hardly help doing so, as we have nothing better afloat."<sup>120</sup>

Shortly after Stockton took command, Rear Admiral Louis Kempf made *Kentucky* his flagship as Commander of the Southern Squadron of the Asiatic Fleet. A year later, his successor, Rear Admiral Frank Wildes, chose the station ship in Manila, USS *Rainbow*, as his flagship; at that point, Stockton took on the additional duty of Chief of Staff, Asiatic Fleet, and *Kentucky*, as the largest American warship present, became the flagship of Rear Admiral Robley Evans, commander in chief of the Asiatic Station. Anxious to make his command into an effective fighting force, Evans attempted to unite the three squadrons of the Asiatic Fleet and to conduct "fleet evolutions" with his sixteen ships of varying types and sizes.<sup>121</sup> Due to the incompatibility of the various ship-types, these exercises were not successful, but Evans had high praise for the commanding officer of his flagship. During drills at Subic Bay shortly after Christmas 1902, as Evans wrote in his published memoirs, "the handling of my flagship during this manoeuver was such as to bring from all who saw it unstinted praise. Captain Stockton showed his ability as an able and accomplished seaman."<sup>122</sup>



During the period of Stockton's command the ship visited a variety of East and Southeast Asian ports in protection of American interests, including Manila, Olongapo, Labuan, Singapore, Chefu, Taku, Nanking, Woosung, Amoy, Nagasaki, Kobe and Yokohama. Stockton's journal for this period consists largely of a record of salutes fired, lists of distinguished callers on board, officers ordered and detached, and ceremonial and social events.<sup>123</sup>

### Naval Attaché Duty and Flag Rank

Following his relief from command of the battleship *Kentucky*, Stockton was ordered to the American Embassy in London, where he served as U.S. Naval Attaché from May 1903 to December 1905.<sup>124</sup> Stockton and his family left New York on the steamer *St. Paul* on 20 May 1903 and arrived in England eight days later, settling into an apartment at 210 Ashley Gardens. Stockton arrived in England at an interesting moment in the history of the Royal Navy. His two and a half years as naval attaché spanned the period when Admiral Lord Walter Kerr ended his period as First Sea Lord and Admiral Sir John Fisher began his first term in that office.<sup>125</sup> Stockton was in a position to observe at first hand the growing rivalry between Britain and Germany, as well as Fisher's style of reform, first as Second Sea Lord, then as Commander in Chief at Portsmouth, and from October 1904, his first fourteen months as First Sea Lord.

While Stockton was in London many of the leading Americans interested in international law met at Lake Mohonk in the Catskills to establish the American Society of International Law. Although he did not play a direct role in the formation of the Society, he was among its original members, and the Society invited him to give an address at the Society's first annual meeting in Washington in April 1907. At that meeting, on the eve of the Second Hague Conference, Stockton took as his theme the question,<sup>126</sup> "Would Immunity from Capture, during War, of Non-offending Private Property upon the High Seas Be in the Interest of Civilization?" The answer, he argued, depended upon "whether the execution of this war right made for the prevention of war or not. If it is, it is in the interest of civilization."<sup>127</sup>

On January 7, 1906, upon his return to the United States, Stockton was promoted to rear admiral. In this grade he served in Washington on a number of boards and special assignments: as President of the Board of Inspection and Survey, of the Naval Examiners Board, and of the Naval Retirement Board. In August 1906 Secretary of the Navy Charles Bonaparte appointed him to the Personnel Board, chaired by Assistant Secretary Truman Newberry.



Finally, when the Special Service Squadron was formed to represent the United States at the Bordeaux Maritime Exposition, Stockton was ordered to its command, in the only assignment in which he flew his flag at sea. Consisting of the armored cruisers *Tennessee* and *Washington*, the squadron visited a variety of French ports. At this time, U.S. relations with Japan were extremely tense. When Stockton's squadron encountered a Japanese squadron under Vice Admiral Ijuin at Brest, there were false reports in the press of tension between the crews of the two squadrons and that Stockton's ships were the vanguard of a fleet to be sent to the Pacific. Quashing the rumors, Stockton told reporters,

The newspapers make the war scares. I haven't seen any American newspapers and I don't know how much of a war scare you have been making here, but I can tell you that, so far as indications I have seen are concerned, the possibilities of a war with Japan seems very remote. There has been absolutely nothing in our cruise that we have encountered to suggest that the Japanese felt anything but good will toward us.<sup>128</sup>

Stockton also told reporters that he would retire on October 13, 1907. When asked what he intended to do, he replied,

I am a man with four homes and I am in something of a quandary as to where to live when my active service is over. Having married a wife from New York, it is of course impossible for me to live in Philadelphia, my old home. Newport has some claims on me, but on the whole I think I shall live in Washington. When a Congressman dies they say he goes to the Senate, and I suppose Washington is the heaven of retired naval officers.<sup>129</sup>

### **The London Naval Conference**

Stockton did retire from active duty in October, though he and his wife first took up residence after all in New York City, at 22 West 9th Street. In early 1908 he wrote an essay on the subject of the "The Use of Submarine Mines and Torpedoes in Time of War,"<sup>130</sup> a subject that had arisen for the first time at the Second Hague Conference and which remained of immediate interest. While the rules that the conference had established on this topic did not go as far as he would have liked, Stockton believed that "the half loaf is certainly better than no loaf at all. By the next conference it is hoped that the safety of the high seas will be provided for in a more effective and comprehensive manner than the rules which were finally formulated in The Hague."<sup>131</sup>

Later in 1908, Great Britain called an International Naval Conference to frame a code of laws for naval warfare and to establish an International Prize Court, following the recommendations of the Second Hague Peace Conference. The conference was to determine as many principles of international maritime law as possible, and it was attended by representatives of the United States, Great Britain, France, Germany, Italy, Austria-Hungary, Russia, Spain, the Netherlands, and Japan. The United States appointed Stockton as its first delegate to the London Naval Conference, to be held in 1908-1909. Professor George Grafton Wilson of Harvard accompanied Stockton as the second delegate, and Ellery C. Stowell was secretary to the delegation.

In preparation, the Secretary of the Navy directed the Naval War College to consider the range of issues that might come before the conference and produce a set of recommendations that could be the basis for instructions to the American delegates. Rear Admiral John P. Merrell, President of the College, submitted a list of twenty-five questions to each of two committees of five officers apiece. The questions ranged from "What regulations should be made in regard to abolition, limitation and classification of contraband?" to "What attitude should be assumed on convoy?" and "Should ransom be allowed? When?" The views of the two committees were dramatically different. The first committee answered each of the twenty-five questions within narrow confines, concluding, among other things, that contraband should not be abolished and that ransom should not be allowed. It split over the issue of convoy, two members for the idea that neutrals convoying by their own ships were immune from search, and three holding that the presence of an escort flying the same flag did not affect the treatment of a neutral convoy. The first committee agreed, however, that a neutral merchant ship being convoyed by a warship of a different neutral nation was not exempt from search by a belligerent.<sup>132</sup>

The second committee took a quite different approach, choosing first to establish a broad policy approach, and producing a diametrically opposed view: "The general policy of the United States as to the rules to be advocated as a basis of International Law should be to bring about the adoption of such rules as will be most advantageous to the United States while being as little advantage as possible to a possible enemy of the United States."<sup>133</sup> The committee reviewed potential wars with South American nations, Britain, and Japan, and the committee members concluded that the United States would need practically all articles now considered as absolute contraband. On the other hand, food supply by sea was not essential to the United States; while it might be to an opponent, the United States could not hope to starve any first



class power by cutting off its food supplies. Moreover, they felt it unlikely that the United States would have anything more than a small amount of mercantile shipping. Therefore, the second committee argued that "the general policy of the United States should be to the following end: (1) Abolish contraband. (2) Limit un-neutral service as far as possible, keeping in view that it would be better for the United States if no such rule existed. (3) Abolish the principle of continuous voyage. No discussion is needed to show that the above would give neutrals every advantage and that this would be very advantageous in case the United States being a neutral."<sup>134</sup> They answered the full set of questions along similar lines, taking the view that ransom should be allowed at the option of the captor and that, since contraband would be abolished, a verbal declaration of the convoy commander should be sufficient to verify that the ships under his protection had no intention to violate a blockade or to perform non-neutral service.

The disparity between the two Naval War College committees reflected the lack of consensus on these issues within the U.S. Navy.<sup>135</sup> A month later, the State Department had formally asked the Navy Department for its views relating to the instructions for US delegates. After further consideration of the issues, Admiral Merrell replied that the positions taken in the College's "Blue Book" *International Law Discussions, 1903*<sup>136</sup> be made part of the instructions. This volume was the result of an effort led by Professor George Grafton Wilson to adapt Stockton's 1900 Code from a purely internal regulation for the U.S. Navy to the basis for an international agreement to which the United States would be a party.<sup>137</sup> In addition, Merrell suggested a number of additional statements should be made in regard to issues that the British ambassador's letter of invitation to the Secretary of State of March 27, 1908, had suggested would come before the Conference.<sup>138</sup> The Naval War College formally recommended that the United States take the following positions:

(a) *Contraband*. First, military materials, arms and other articles, solely of use for war, when within or destined for territory within the enemy's jurisdiction. Second, anything destined for the enemy's naval or military use.

1. . . .

2. In general, the penalty for the carriage of contraband is the loss of freight, and delay during adjudication, and if the owner of the contraband is owner in the vessel carrying the contraband, the condemnation of his portion of the vessel.



3. Neutral merchant ships, under neutral convoy are exempt from visit and search.

4. The question of compensation where vessels have been seized but have been found, in fact, only to have been carrying innocent cargo, should be determined by the court in each instance upon its merits.

(b) A vessel is liable to the penalty for violation of blockade from the time of her departing from neutral jurisdiction, with the intention to violate blockade, until the completion of her voyage.

In case the master of a vessel receives warning direct from a government vessel, or it is clear that he knows of the existence of the blockade from official or private information or from any other source, such master shall be considered to have received actual notice of the blockade.

In the following cases it shall be deemed that the notice of the declaration of the blockade has been received:

1. The case in which the master of a vessel is considered to have received a notice of the blockade whether he has actually received it or not, such notice having been sent to the proper authorities of the country to which the vessel belongs, and there having elapsed a sufficient time for the authorities to notify the residents of their nationality.

2. The case in which the master of a vessel is considered to have received a notice of the blockade, the fact of the blockade having been made public.

(c) As to continuous voyage, the actual destination of vessels or goods will, as a rule, determine their treatment on the seas outside of neutral jurisdiction.

(d) If there are controlling reasons why enemy vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious disease, or the lack of a prize crew, they may be appraised and sold, and if this cannot be done, may be destroyed. The imminent danger of recapture would justify destruction, if there was no doubt that the vessel was good prize, But in all such cases, all the papers and other testimony should be sent to the prize court, in order that a decree may be duly entered.

If a seized neutral vessel cannot, for any reason, be brought into port for adjudication, it should be dismissed, except when the master and crew refuse to

aid in bringing the vessel to a prize court, or when the vessel is guilty of unneutral service, in which case the vessel may be treated as an enemy vessel.

(e) Neutral ships and persons acting in such manner as to identify themselves with the enemy are guilty of unneutral service, and are liable to treatment as belligerents.

(f) The conversion of merchant vessels into war vessels should not be allowed on the high seas.

(g) The transfer of vessels, when completed before the outbreak of war, even though in anticipation of war, is valid if in conformity to the laws of the state of the vendor and of the vendee.

The transfer of a private vessel from a belligerent's flag during war is recognized by the enemy as valid only when bona fide and when title has fully passed from the owner and the actual delivery of the vessel to the purchaser has been completed in a port outside the jurisdiction of the belligerent states in conformity to the laws of the state of the vendor and of the vendee.

(h) The domicile of the owner should be the dominant factor in determining the treatment of property in time of war, though a strict rule to this effect would be open to many exceptions.<sup>139</sup>

In their official instructions, Stockton and Wilson were directed,

As to the framing of a convention relative to the customs of maritime warfare you are referred to the Naval War Code promulgated in General Order No. 551 of the Navy Department of June 27, 1900, which has met with general commendation by naval authorities throughout the civilized world and which in general expresses the views of the United States, subject to a few specific amendments suggested in the volume of international law discussions of the Naval War College of the year 1903, pages 91 to 97. The order putting this code into force was revoked by the Navy Department in 1904, not because of any change of views as to the rules it contained, but because many of those rules, being imposed upon the United States by the order, would have put our naval forces at a disadvantage as against the forces of other powers, upon whom the rules are not binding. The whole discussion of these rules contained in the volume to which I have referred is commended to your careful study.<sup>140</sup>

The two delegates to the London Conference, Stockton and Wilson, hardly needed further study of this volume. Nevertheless, the explicit mention of this volume in the orders gave a formal affirmation to their earlier work and to the effort of the Naval War College in this area.

Two months before the conference began, Foreign Secretary Sir Edward Grey suggested to the United States that the American and British naval delegates meet before the conference and come to some practical agreement on the questions under discussion, creating a joint position on common Anglo-American interests. Stockton went to London, although at that point he had no formal instructions beyond the views that the Naval War College had provided. There he met with Admiral Sir Edmond Slade and Admiral Sir Charles Ottley, both of whom Stockton had known from his days as a naval attaché. The British representatives seem to have misinterpreted Stockton's natural reticence for agreement. In his private diary, Slade described Stockton as "deaf & not very quick" but "very conciliatory." Slade had the impression that the United States would "support our views throughout."<sup>141</sup> In fact Stockton was at the time writing to Washington that "practically the only thing of any importance between our precedents and rules and that of the British of consequence is the right of search of vessels under convoy of vessels of war. I told them that we could not concede that right—from mere self-respect—and I was assured that they were willing to give that up as they stood alone in that matter."<sup>142</sup> President Merrell of the Naval War College agreed that the United States should stand firm on the convoy issue, asserting further that "anything, no matter what its character, destined for the use of the enemy's military or naval forces, is contraband."

When the conference convened the State Department maintained the American position, often refusing to compromise. The issue of contraband became a particularly divisive one, as did the doctrine of continuous voyage. British expectations that the United States would follow its lead and compromise evaporated quickly. The British became exasperated with its inflexible stance in attempting to gain international approval for the Naval War Code; Slade confided to his diary, "The Americans are impossible and there is a strong probability of their wrecking everything."<sup>143</sup> Going even so far at one point as to walk out of the Conference, Stockton finally succeeded in getting removed from the declaration an article declaring that absolute contraband could be condemned only when the captor provided absolute proof of enemy destination. The United States agreed to maintain the doctrine of continuous voyage for absolute contraband and blockade, but to abolish it for conditional contraband. Stockton joined the other delegates in signing the final document of the Conference, the seventy-one articles of the Declaration of London Concerning the Laws of Naval War of 26 February 1909. Despite these efforts, no State would ratify the Declaration when the British parliament refused to approve it. Nevertheless, it was applied by the participants in the



Turco-Italian of 1911, the Balkan Wars of 1912–1913, and with modifications by the French and British between 1914–1916 during World War I.

In April 1909, shortly after the London Naval Conference, Stockton would summarize its work in an address to the American Society of International Law. Taking pride in the work of the American delegation, he pointed out that Chapter One of the Convention on blockade in time of war codified and crystallized what had been the American practice and jurisprudence on that subject.<sup>144</sup> He explained the compromise whereby the United States had given up the doctrine of continuous voyage for blockade and conditional contraband in order to obtain agreement with its application to absolute contraband, a view several nations accepted at the Conference for the first time.<sup>145</sup> Several attempts had been made during the conference to revive the old “Rule of 1756,” which would treat as an enemy merchant vessel any neutral engaging, with the consent of an enemy government, in trade forbidden to them in time of peace. The American delegation had successfully fought these attempts, since in Stockton’s view they might affect future development of American coastal trade that would follow the opening of the Panama Canal, and the increased trade with American possessions in the West Indies and in the Pacific.<sup>146</sup> Most importantly, Stockton pointed out, “For the first time in history the great sea powers—and consequently the great powers of the world—have agreed upon a code formulated with very considerable detail and precision, which settles many disputed questions of maritime warfare.”<sup>147</sup> Despite the difficulty of the negotiation, it had been an accomplishment that in no small measure was his own, but he was well aware that there was more work to be done.

In his remarks Stockton would also note that in order to smooth the way for American ratification of the 1907 protocol on establishment of the International Prize Court at The Hague, the American delegation had proposed that cases coming before it be considered rehearings *de novo*, as direct claims for compensation, rather than as appeals to a court that might be considered higher than national courts. Agreement on this point allowed the United States to circumvent constitutional issues which would have otherwise prevented ratification of that agreement.<sup>148</sup>

### Academe, and the First World War

Upon his return from London, Stockton and his wife settled in Washington, D.C. where he lived for the remainder of his life, at 2019 O Street, N.W. He quickly became associated with George Washington University, which

awarded him an honorary doctor of laws degree in 1909, recognizing his contributions to international law. The following year, George Washington University appointed Stockton as lecturer in law and diplomacy. During Stockton's first year at George Washington he wrote his *Manual of International Law for the Use of Naval Officers*, first published under that title in 1911.<sup>149</sup> The outline and approach of the new book clearly followed the model of his earlier 1894 *Manual Based upon Lectures Delivered at the Naval War College*. In his preface to the new volume, Stockton wrote,

My study of international law, begun at the United States Naval Academy and continued during my mature years at the Naval War College, convinces me that to no service of government is a knowledge of international law more valuable than to that of the navy. I might also add that, so far as my experience goes, there is no naval service whose members are more familiar with the tenets of the laws of nations than our own.<sup>150</sup>

In April of 1910, George Washington University elected Stockton a member of its Board of Trustees, and in May appointed him acting president of the university. During these years the university was in financial difficulty and surrounded by controversy. Stockton effectively set about restoring confidence in the university, reorganizing the administration and its finances.<sup>151</sup>

Despite the administrative burdens placed on him, Stockton continued his interests in international law. In 1912 he returned to the subject of the codification of the laws of naval warfare in an address before the American Society of International Law. Speaking at the Society's annual meeting, he suggested that the agreements in the Declaration of Paris, the First and Second Hague Conventions, and the Declaration of London provided sufficient material from which to form the component parts of a naval code. However, taken together, they left thirteen major questions that still needed to be settled:

1. The conversion and reconversion of merchantmen and warships.
2. The status of aliens engaged in sea trade in the enemy's country.
3. The Rule of 1756. The status of neutral vessels engaged in wartime in trade forbidden them in peace time, including cabotage and petit cabotage.
4. The use of false colors in war time by belligerent warships.
5. The use and treatment of telegraphic cables in wartime.
6. The immunity from capture of private property at sea.
7. The formation of a volunteer navy. Privateering.
8. The extension of immunities from search and detention of neutral mail steamers in wartime.
9. The extension of the width of the marginal sea belt or marine league.



10. The recognition and status of insurgent warships at sea.
11. The rules of the visits of belligerent warships in neutral ports, their internment, refueling and extent of their periods of return.
12. The definite period allowed to an enemy ship in port at the outbreak of war or declaration of blockade—days of grace.
13. The status of pacific blockade in regard to merchant vessels of Powers not immediately concerned.<sup>152</sup>

Stockton declared, "I think it is not unreasonable to hope and expect that at the next Hague Conference the beginning of a codification of the rules of naval warfare may be begun. The revision of this sea code will follow in the successive meetings after a trial which is likely to be had in the occasional, or may we hope for the future, in the *rare* occurrence of maritime war."<sup>153</sup>

Returning again to his long-standing interest in the Caribbean basin, he wrote two essays<sup>154</sup> in which he objected to the Panama Canal Act of 1912, which Congress had passed on 24 August of that year, less than ten days after the canal first opened for traffic. This Act exempted U.S. coastwise trade from payment of the canal tolls, whereas, Stockton pointed out, the Hay-Pauncefote Treaty had provided that the canal would be free and open to merchant vessels and warships of all nations on entirely equal terms. Majority opinion in the United States interpreted the treaty provision to mean uniformity of rates when charged, but Stockton pointedly argued that the phrase "all nations" included the United States and U.S. vessels could not be exempt from tolls. As one of the few Americans who had long experience with both the country's strategic interests and its international legal responsibilities in connection with the Panama Canal, Stockton's voice carried great weight. Under pressure of this sort, Woodrow Wilson asked Congress to repeal the Act in 1914.

Throughout his career, Stockton was an advocate of legal equity before the law as well as restraint in warfare, but at the same time he remained an advocate of preparedness and a strong navy. Speaking at the University of Chicago in early 1913, on the very day that Congress made a deep cut in appropriations for future naval construction, Stockton declared that an increase in the country's naval forces would be a measure for common safety. "Every year should be a year of preparation and construction in the navy, so long as wars cannot be eliminated and armaments continue to increase. Woe to any country which leave its coast, its coast towns and its export trade the subject of injury and destruction on account of a weak navy."<sup>155</sup> On the other hand, he advocated that the United States reduce the area to which it applied the Monroe Doctrine, limiting it to the West Indies, the Caribbean, and the Gulf of Mexico. He urged that the United States establish a defense board for



this area and that it create a naval program that would render it “an American Mediterranean, under full and perpetual control of the United States.”<sup>156</sup>

Stockton remained keenly interested in the academic study of international law. In 1914, he represented George Washington University at the first conference of teachers on international law, organized in 1914 by the American Society of International Law and the Carneige Endowment. To fill the need for a textbook in this area, the New York publisher Charles Scribner and Sons asked Stockton to prepare a volume on international law to supersede Theodore Woolsey’s study, which they had kept in print with notes by Woolsey’s son. Stockton’s new volume, *Outlines of International Law*, which appeared in late 1914, was by far the largest of his books, extending to 616 pages in length. In his introduction, Stockton noted the great need at that moment for an authoritative textbook for students of law as well as for the general public. “The deplorable war which is being carried out at the time of this writing,” he said, “has created many complex problems and delicate situations in connection with international law. It has been said by good authority that there have arisen more vexed questions in international law during the first six weeks of this war than in the entire period of the Napoleonic contests.”<sup>157</sup> Stockton made a particular point of including in the book Richard Henry Dana’s notes on recognition of belligerency and independence, which he had long felt were classics on the subject but had been denied publication in the United States since the legal dispute over Dana’s 1886 edition of *Wheaton*.<sup>158</sup> The *New York Times* reviewer believed that it would get “a warm welcome,” particularly as it appears “just at this moment, when American are seriously discussing important questions involving American rights and responsibilities thrust upon them through the operations and attitudes of the powers now engaged in war.”<sup>159</sup>

As World War I unfolded, Stockton watched maritime events with great interest. In January 1915 a German raider captured and sank the first American merchantman, and in March two American vessels were lost to mines in the North Sea. Deeply concerned even before the United States had suffered serious losses at sea, Stockton set out to inform the American public about the issues. Writing in the widely read journal *The World’s Work*, Stockton explained that “the outbreak of war automatically divides all civilized nations of the world into two general classes, belligerents and neutrals. . . . There is no choice; countries can not manage to refuse war once declared against them, and neutral governments must be either impartial and cannot shade their neutrality into either a state of sympathetic or that of unfriendly neutrality.”<sup>160</sup> After outlining the development of the law, he summarized the

world situation as he saw it, rehearsing the thirteen points he had earlier compiled as the main unsettled question in the law of maritime warfare. He could now add a fourteenth: the laying of floating mines upon the high seas. "Besides the settlement of these questions there remain glaring defects in connection with international law:"

1. Insufficient means for enforcing the rules of international law and for enforcing and punishing infractions.

2. The inconsistent treatment of innocent non-combatants, who are not allowed on the one hand to defend themselves and their homes against intrusion and violence of the military forces of the enemy, but who can be killed and maimed by surprise, if innocently occupying residential portions of defended towns and of certain undefended towns and places.

3. The evasion of conventions and treaties concerning the rules of war on account of the non-adherence of one of the belligerents, no matter how insignificant the nationality may be.

4. A common agreement as to military necessities.<sup>161</sup>

In 1917, Stockton prepared a revision to his *Manual for the Use of Naval Officers*, adding a supplementary chapter, an updated bibliography, an index, and additional documents in the appendix, notably the text of the U.S. neutrality proclamation.<sup>162</sup> The following year Stockton resigned from the presidency of George Washington University, though he retained his post as lecturer in international law and diplomacy until 1921. Recognizing his great success in leading the university, the Board of Trustees formally minuted that he had taken up the post "when the affairs of the university were at a crisis. . . . Its steady and peaceful growth has been the result of conservative methods maintained within the lines of constructive expansion. The characteristic of Admiral Stockton's administration has been the firm security with which each step has been safely and permanently retained."<sup>163</sup>

### Retirement

Stockton remained active in the field of international law. From 1908 until 1924 he was repeatedly reelected as a member of the Executive Committee of the American Society of International Law, and he regularly participated in the work of the Society. At the 1919 annual meeting, he commented on the Covenant of the League of Nations and on the recommendation for an International Law Conference.<sup>164</sup> In his next published writing he made a careful examination of American policy and the 1856 Declaration of Paris in



terms of its four principal issues: the abolishment of privateering, the safety of a neutral flag for enemy goods other than contraband, the protection of neutral goods other than contraband under an enemy flag, and the idea that blockades in order to be binding must be effective. He concluded that while the United States had never signed the Declaration, taking exception to the abolition of privateering, it was an issue that subsequent maritime history had shown to be unimportant. In this area the United States followed the other doctrines, those declared officially during the Spanish American War, and were either literally included or implied in the *Naval War Code of 1900*, and contained in the 1908 Declaration of London—which he believed had exhaustively defined the subject of blockade.<sup>165</sup> In preparation for the Washington Conference in 1921, Stockton served on the Society's subcommittee to formulate changes to the laws of warfare. At the Society's annual meeting that year Stockton noted that the laws "have not been disclaimed even in recent wars, even if in some cases they were not followed to a full extent by a delinquent belligerent. The existence of vice does not nullify virtue."<sup>166</sup> In April 1923, thirteen months before his death, he rose for the last time at the American Society of International Law annual meeting to give a brief comment on the three-mile limit.<sup>167</sup>

Stockton died, aged seventy-nine years, of heart disease at his O Street home in Washington on May 30, 1924. Following a funeral in his parish church, St. John's Episcopal Church at 16th and H streets, he was buried in Arlington National Cemetery.<sup>168</sup>

In nineteenth century America, many people considered the establishment, clarification, and dissemination of international law as only a branch of the larger field of law. Typically the men involved were either statesmen, who established practices and doctrine, judges, who made important decisions, and scholars, who contributed to the gradual evolution of education and literature on the topic. Although the practice of naval operations played an important role, it was unusual during this period to find a naval officer who was a distinguished student and writer in this period. From the 1880s to the early decades of the twentieth century, Charles Stockton was certainly the most important figure for the development of international law in the U.S. Navy. While he is most often remembered as the author of the *Naval War Code of 1900* and as the principal American delegate to the London Conference in 1908–1909, which translated his *Code* into International Law, he had an even greater and wider influence within the Navy. He was a key figure in the institutional history of the Naval War College, nurturing and sustaining it at



critical times in its second decade. He supervised construction of its first purpose-built building, saved the College from dissolution in 1899, and laid the foundation for its continuing work on the subject of the law of naval warfare. On a wider stage within the Navy, his textbooks and manuals for the study of international law, and his initiative in promoting the practical study of international law through wide ranging discussions centered on situations, influenced generations of American naval officers as well as others interested in the subject of international maritime law. In addition to these achievements, he was an accomplished seaman, commanding the Navy's newest battleship in the Far East, and leading a significant voyage of exploration of Alaska and the Arctic.

Several days after his death, in an editorial supplementing his obituary printed the previous day, *The New York Times* praised his contributions to international law and recalled that Stockton had been "a great sea lawyer as well as a capable and energetic officer with a credible service afloat." After outlining his contributions to international law and noting his reputation as the best-informed man in the U.S. Navy on international law, the editorialist offered an assessment: that he "has been compared as a naval author with Admiral Mahan, but the fact should not be lost sight of that Mahan preferred the library to the deck of a ship. This was not the case with Stockton."<sup>169</sup>

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### Notes

1. Naval War College Archives, record group 3, box 173: Chair of International Law, file 12,040.
2. The sections on his early life are largely derived from the manuscript, *Recollections of My Life, Afloat and Ashore, from the Beginning to My Arrival in Rio de Janeiro in 1866*. Naval Historical Collection, Naval War College, ms. coll. 56: Stockton Papers, box 2, folder 4A [hereafter *Recollections*].
3. Transcription of letter from Rev. Thomas Stockton to Rev. William Stockton, (July 5, 1861) in *Recollections*, *supra* note 2, at 15a.
4. DAVIS, *NIMROD, OR THE AMERICAN WHALEMAN* (1874).
5. *Recollections*, *supra* note 2, at 24.
6. *Id.* at 28.
7. Letter from Commanding Officer, USS *Sabine* to C.H. Stockton (Feb. 20, 1866), Stockton Papers, box 1, folder 1.
8. *Recollections* (Part 2), *supra* note 2, at 15.
9. *Id.* at 17.
10. STILL, *AMERICAN SEAPOWERS IN THE OLD WORLD: THE UNITED STATES NAVY IN EUROPEAN AND NEAR EASTERN WATERS, 1865-1917*, at 64-66 (1980).
11. One shipmate wrote his memoirs of this voyage. SCHROEDER, *A HALF CENTURY OF NAVAL SERVICE* 77-104 (1922).

12. Letter from Captain R. Chandler to Secretary of the Navy (Sept. 14, 1881), Stockton Papers, box 1, folder 1.
13. Cornelia Stockton, later wife of Captain Frederick A. Traut, USN, (1871–1958), U.S. Naval Academy class of 1892.
14. GLEAVES, THE ADMIRAL: THE MEMOIRS OF ALBERT GLEAVES, ADMIRAL, USN 23 (1985).
15. Letter from Captain D.B. Harmony to Secretary of the Navy (Sept. 6, 1881), Stockton Papers, box 1, folder 1.
16. See letters from these boards acknowledging with deep regret his resignation from the boards on his assignment to sea duty in April 1889. Stockton Papers, box 1, file 1.
17. STOCKTON, ORIGINS, HISTORY, LAWS, AND REGULATIONS OF THE UNITED STATES NAVAL ASYLUM, PHILADELPHIA (1886).
18. Stockton, *The Naval Asylum and Service Pensions for Enlisted Men*, 12 NAVAL INST. PROCEEDINGS 53 (1886).
19. Comment, 13 NAVAL INST. PROC. 541 (1887).
20. Letter from Richard Wainwright to Stockton (Oct. 8, 1888), Stockton Papers, box 1, folder 1.
21. Stockton, *Simpson's Timber Dry Docks*, 13 NAVAL INST. PROC. 221 (1887).
22. Letter from Rear Admiral S.B. Luce to Stockton (Jan. 4, 1888), Stockton Papers, box 1, folder 1. *See also*, Knight, unpublished typescript, History of the Naval War College to 1914, pages for 1887 and 1888, Naval Historical Collection.
23. Lectures 2 and 3 of this series, given in 1887 and 1888 are "Strategic Studies in the Gulf of Mexico, Caribbean Sea, and the Pacific Ocean," Naval War College Archives, record group 8, series 1, box 27, file S. For an example of Stockton's sources, see the transcription of the letter from Commander Colby M. Chester to Rear Admiral Luce (July 9, 1888) on pp. 8–9 of lecture 2.
24. See letter from A.T. Mahan to Horace E. Scudder (Sept. 26, 1890) in LETTERS AND PAPERS OF ALFRED THAYER MAHAN 26 (Seager & Maguire eds., 1975).
25. REPORT OF THE SECRETARY OF THE NAVY, 1889, pt. 1, 124–67 (1890).
26. Exchange of telegrams between Bureau of Navigation, Stockton and Emory (Apr. 1889), Stockton Papers, box 1, folder 1. There is no hint of this in THE LIFE OF AN AMERICAN SAILOR: REAR ADMIRAL WILLIAM HEMSLEY EMORY, UNITED STATES NAVY (Gleaves ed., 1923).
27. Journal of the Cruise of the Thetis in Alaskan and Arctic Waters May 31st 1889 to [13 October 1889, off Sitka], entry for July 21, 1889. Stockton Papers, box 2, folder 5, [hereinafter Journal] *quoted in* SHULMAN, NAVALISM AND THE EMERGENCE OF AMERICAN SEA POWER, 1882–1893, at 92–93, (1995).
28. *Id.*, entry for Sept. 15, 1889, *quoted in* SHULMAN, *supra* note 27, at 93.
29. Undated clipping from *The Spirit of Missions*, c. 1925, at 602–603, Stockton Papers, box 3, folder 7.
30. Letter from John W. Wood, National Council Protestant Episcopal Church, to Marcus Bergman, National Museum, Washington, D.C. (July 14, 1924), Naval Historical Collection, Naval War College, ms. coll. 56: Stockton Papers, box 1, folder 3. *See also* Journal, *supra* note 27. Stockton visited Cape Hope on three occasions in this period, 4–5, 24 July, 10–20 September 1889. For his dealings with the natives, see, in particular, pp. 150–61.
31. Letter from Commissioner, Bureau of Education, Interior Department to Stockton (Apr. 11, 1890), Stockton Papers, box 1, folder 1.
32. Alaska Historical Society certificate, Sitka, Feb. 14, 1890, Stockton Papers, box 1, folder 1.

33. Stockton, *Arctic Cruise of U.S.S. Thetis in the Summer and Autumn of 1889*, 2 NAT'L GEOGRAPHIC MAG. (1890) [hereinafter *Arctic Cruise*]. The article includes a map, showing the track of the *Thetis*.

34. Hydrographer of the Navy, Circular Letter (Jan. 2, 1890) forwarding Report of Ice and Ice Movements in the Bering Sea and the Arctic Basin by Ensign Edward Simpson under Direction of Lieutenant Commander C.H. Stockton. Report no. 92 (1890).

35. *Arctic Cruise*, *supra* note 33, at 171, and *Reconstruction of the United States Navy*, OVERLAND MONTHLY, October 1890, at 381.

36. *Id.* at 384.

37. Letter from Lansing Mizner, U.S. Legation in Central America, to Stockton (Sept. 13, 1890), Stockton Papers, box 1, folder 1.

38. Letter from Assistant Secretary of the Navy James R. Soley to Stockton (Sept. 10, 1890), forwarding letter from Acting Secretary of State W. F. Wharton to Secretary of the Navy (Sept. 9, 1890), Stockton Papers, box 1, file 1.

39. Letter from Caspar Goodrich to President, Naval War College (Mar. 5, 1906), Naval War College Archives, record group 1, box 3, folder 23, quoted in HATTENDORF, ET AL., *SAILORS AND SCHOLARS: THE CENTENNIAL HISTORY OF THE NAVAL WAR COLLEGE* 30 (1984).

40. ANNUAL REPORT OF THE SECRETARY OF THE NAVY, 1889, at 37 (1890), *quoted in id.* at 30.

41. Orders to Stockton, August 18 and October 3, 1891, Stockton Papers, box 1, file 1.

42. MAHAN, *FROM SAIL TO STEAM* 303 (1907).

43. Draft letter from Mrs. Helen Stockton Parker (Mrs. W. Ainsworth Parker) to Captain W.D. Puleston (January 1936), Naval Historical Collection, Naval War College, ms. coll. 56: Stockton Papers, box 2, folder 3.

44. Mahan, *The Practical Character of the Naval War College*, *quoted in* HATTENDORF, *supra* note 39, at 32.

45. Official Journal of the Naval War College, 1892-1895, Naval War College Archives, record group 1, box 6.

46. Stockton, *Notes upon the Necessity and Utility of the Naval War College in Connection with Preparations for Defence and War*, 19 NAVAL INST. PROCEEDINGS 407, quotation at 408 (1893).

47. SNOW, *CASES AND OPINIONS IN INTERNATIONAL LAW* (1893).

48. TAYLOR, *ADDRESS DELIVERED TO THE CLASS AT THE NAVAL WAR COLLEGE UPON THE CLOSING OF THE SESSION OF 1894*, at 15 (1894).

49. "International Law, memo of proposed subjects for lectures drawn up as a suggestion to Professor Snow," Naval War College Archives, record group 28: President's File—Stockton, Charles H.

50. *Id.*

51. *Id.*

52. The text of this lecture is in the Naval War College Archives, record group 14: Faculty and Staff Presentations, box 1 (1886-1900).

53. *Id.*

54. NAVAL WAR COLLEGE, *INTERNATIONAL LAW SITUATIONS* (1894).

55. HATTENDORF, *supra* note 39, at 41. Letter from Stockton to Lieutenant Charles Cooper, Naval Institute (Dec. 10, 1898), Naval Historical Collection, Naval War College, ms. coll. 56: Stockton Papers, box 2, folder 2: letterbox of Official Correspondence 1889-1900, at 77, 74-75.

56. INTERNATIONAL LAW LECTURES DELIVERED AT THE NAVAL WAR COLLEGE BY FREEMAN SNOW, PH.D., LL.B., LATE INSTRUCTOR IN INTERNATIONAL LAW IN HARVARD



UNIVERSITY: PREPARED AND ARRANGED FOR PUBLICATION BY CHARLES H. STOCKTON (1895).

57. Letter from S. U. Macvane to Stockton (Sept. 13, 1894), reproduced in *Recollections*, *supra* note 2, at 39.

58. ONI receipt, March 1895, Stockton Papers, box 1, folder 1.

59. The manuscript texts of these ten lectures are in the Naval War College Archives, record group 15: Guest Lectures, box 1, 1894–1903.

60. NAVAL WAR COLLEGE, INTERNATIONAL LAW (1895). Stockton is identified as the author and compiler of the International Law Situations only in NAVAL WAR COLLEGE, ABSTRACT OF COURSE, 1895, at 5 (1895).

61. Miscellaneous Notes and Memoranda made during the Cruise of the *Yorktown*, 1895–1896, at 19–20, Stockton Papers, box 3, folder 1.

62. BRAISTED, THE UNITED STATES NAVY IN THE PACIFIC, 1897–1909, at 17–18 (1958).

63. Report of Inspection of USS *Yorktown* (September 21, 1897), Stockton Papers, Official and semi-official letters, box 2, folder 1. Letter from Acting Secretary of the Navy Theodore Roosevelt to Stockton (Oct. 28, 1897), typescript copy in Stockton Papers, signed original in National Archives, record group 45: area files, area 10.

64. Letter from Allan D. Brown, President, Norwich University, to Stockton (Mar. 28, 1898), Stockton Papers, box 2, folder 1.

65. Letter from Stockton to Luce (June 5, 1898), *printed in* LIFE AND LETTERS OF STEPHEN B. LUCE, U.S. NAVY, FOUNDER OF THE NAVAL WAR COLLEGE 280 (Gleaves ed., 1925).

66. Letters from Stockton to Dewey and Sampson (July 22, 1898), Naval Historical Collection, Naval War College, ms. coll. 56: Stockton Papers, box 2, folder 2: letterbook of Official Correspondence 1889–1900, at 10–11.

67. A MANUAL BASED UPON LECTURES DELIVERED AT THE NAVAL WAR COLLEGE BY FREEMAN SNOW, PH.D., LL.B., LATE INSTRUCTOR IN INTERNATIONAL LAW IN HARVARD UNIVERSITY (2d ed.), PREPARED AND ARRANGED FOR PUBLICATION BY THE DIRECTION OF THE NAVY DEPARTMENT BY COMMANDER C.H. STOCKTON, U.S.N. (1898). The first copies of the book were received from the printers in January 1899. *See* Letter from Stockton to Chief, Bureau of Equipment (Jan. 10, 1899), Naval War College Archives, record group 1, box 7, letter book, 1897–1900, at 238 ff.

68. Letter from Stockton to Senator Nelson Aldrich (July 19, 1899), Stockton Papers, box 2, Official letter book, letter 167.

69. Letter from Stockton to Assistant Secretary of the Navy (Feb. 15, 1899), Naval War College Archives, record group 1, box 6, letterbook 1899–1901, at 4.

70. Preparation for War, Naval War College Archives, record group 16: Opening Addresses, 1899.

71. STOCKTON, PREPARATION FOR WAR: A DISCUSSION OF SOME OF THE VARIOUS ELEMENTS TO BE CONSIDERED IN THE FORMATION OF PLANS OF OPERATIONS AND IN THE STUDY OF CAMPAIGNS, DELIVERED AT THE OPENING OF THE COURSE AT THE NAVAL WAR COLLEGE, NEWPORT, R.I., MAY 31, 1899 (1899).

72. NAVAL WAR COLLEGE, INTERNATIONAL LAW SITUATIONS 1899 (1899).

73. The manuscripts of all three 1899 lectures are in Naval War College Archives, record group 14: Faculty and Staff presentations, box: 1886–1900.

74. Letter from Stockton to Lieut. Charles Copper, Secretary, Naval Institute (Dec. 10, 1898), Naval Historical Collection, Naval War College, ms. coll. 56: Stockton Papers, box 2, folder 2: Letterbook of Official Correspondence 1889–1900, at 77, 74–75.

75. Stockton read French and knew this work from the French edition: TESTA, LE DRIOT PUBLIC INTERNATIONALE MARITIME (1886).
76. ORTOLAN, DIPLOMATIE DE LA MER (1864).
77. Stockton, *Submarine Cables in Time of War*, 14 NAVAL INST. PROC. 451 (1898).
78. Stockton, *The American Interoceanic Canal: A Study of the Commercial, Naval, and Political Conditions*, 25 NAVAL INST. PROCEEDINGS 753 (1899).
79. *Id.* at 767.
80. *Id.* at 797.
81. Stockton, *Capture of Enemy Vessels at Sea*, THE NORTH AM. REV., Feb. 1899, at 206.
82. Letter from Stockton to Judge Advocate General (Oct. 26, 1899), Naval War College Archives, record group 1, box 7, letterbook 1897–1900, at 314–18, quote at 314.
83. *Id.* at 315.
84. *Id.* at 317.
85. *Id.*
86. *Id.* at 317–318.
87. Letter from Stockton to Secretary of the Navy (Nov. 6, 1899), Naval War College Archives, record group 1, box 6, letterbook 1899–1901, at 119–21.
88. Letter from Stockton to W. W. Kimball (Nov. 4, 1899) Naval War College Archives, record group 1, box 7, letterbook 1897–1900, at 319.
89. *Id.*
90. Letter from Stockton to Judge Advocate General of the Navy (Nov. 24, 1899), *in id.* at 129.
91. Letter from Stockton to Secretary of the Navy (Nov. 22, 1899), *in id.* at 125.
92. Letter from Stockton to Secretary of the Navy (Feb. 20, 1900), *in id.* at 164.
93. Letter from Stockton to George Dewey (Apr. 25, 1900), *in id.* at box 7, p. 375.
94. Stockton mentions Walker's contribution in his official, annual report on the Naval War College. Letter from Stockton to Assistant Secretary of the Navy (Oct. 1, 1900), *in id.* at 312, 314, printed in ANNUAL REPORT OF THE SECRETARY OF THE NAVY (1890).
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97. Letter from Stockton to Secretary of the Navy (May 19, 1900), *in id.* at 236–40. With the exception of altering the wording, but not the meaning, of the first two sentences and omitting the final paragraph on who had reviewed the draft before it was submitted, an undated version of this letter was printed in NAVAL WAR COLLEGE, INTERNATIONAL LAW DISCUSSIONS, 1903: THE UNITED STATES NAVAL WAR CODE OF 1900, at 5–7 (1904).
98. *Id.*
99. Letters from Stockton to Secretary of the Navy (June 21 & 22, 1900), Naval War College Archives, record group 1, box 6, letterbook 1899–1901, at 258, 261.
100. THE LAWS AND USAGES OF WAR AT SEA, NAVAL WAR CODE (1900).
101. Letter from Stockton to Secretary of the Navy (June 28, 1900), Naval War College Archives, record group 1, box 6, letterbook 1899–1901, at 264.
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103. Letter from Stockton to Chief Intelligence Officer, Navy Department (Aug. 13, 1900), *in id.* at 287.
104. A NAVAL WAR CODE, THE TIMES [LONDON], April 5, 1901.



105. Letter from Lieut. William McCarty Little to James Brown (Oct. 8, 1900) and endorsements to requests from the Navy Department, Naval War College Archives, record group 1, box 6, letterbook 1899–1901, at 329, 331, 340.
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107. Letter from Stockton to Lieutenant E.W. Eberle (June 21, 1900), Naval War College Archives, record group 1, box 6, letterbook 1899–1901, at 259.
108. Stockton, *An Account of Some Past Military and Naval Operations Directed against Porto [sic] Rico and Cuba*, 26 NAVAL INST. PROCEED. 457, 475 (1900).
109. Summary of schedule for 1900, Naval War College Archives, record group 1, box 6, letterbook 1899–1901, at 323–25. On International Law Situations for 1900, see Chadwick to Assistant Secretary of the Navy (Nov. 27, 1900), in *id.* at 365.
110. Orders from Captain F.E. Chadwick to Stockton (Oct. 27, 1900), in *id.* at 349, with reference to FREEMAN H. SNOW, *CASES AND OPINIONS IN INTERNATIONAL LAW* (1893).
111. NAVAL WAR COLLEGE, *ABSTRACT OF THE COURSE*, 1900, at 63 (1901).
112. NAVAL WAR COLLEGE, *INTERNATIONAL LAW: RECENT SUPREME COURT DECISIONS AND OTHER OPINIONS AND PRECEDENTS* (1904).
113. Letter from Chadwick to Assistant Secretary of the Navy (Jan. 3, 1901), in *id.* at 386. WILSON, *INSURGENCY: LECTURES DELIVERED AT THE NAVAL WAR COLLEGE, NEWPORT, RHODE ISLAND, AUGUST 1900* (1900).
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115. Letter from Chadwick to Assistant Secretary, *supra* note 114, at 480.
116. *Id.* at 388.
117. Letter from Chadwick to Assistant Secretary of the Navy (Jan. 4, 1901), in *id.* at 389. The British ambassador requested eight copies of *The Laws and Usages of War at Sea*, Chadwick to Chief Intelligence Officer (Mar. 4, 1901), in *id.* at 461.
118. Stockton, *Laws and Usages of War at Sea*, FORUM, February 1901, at 705–709.
119. BRAISTED, *THE UNITED STATES NAVY IN THE PACIFIC, 1897–1900*, at 114 (1958).
120. Letter from Chadwick to Stockton (Apr. 22, 1901), Naval War College Archives, record group 1, box 7, letterbook 1900–1902, at 260.
121. *Id.* at 118.
122. EVANS, *AN ADMIRAL'S LOG: BEING CONTINUED RECOLLECTIONS OF NAVAL LIFE* 211 (1910).
123. Journal of the Cruise of the USS Kentucky, Captain C.H. Stockton, USN, Commanding, March 11, 1901 [to March 1903], Stockton Papers, box 3, folder 2.
124. Private Diary, 1904, Stockton Papers, box 3, folder 3.
125. Much has been written about this period. See, e.g., WILLIAMS, *DEFENDING THE EMPIRE: THE CONSERVATIVE PARTY AND BRITISH DEFENCE POLICY 1899–1915*, at 59–76 (1991); MARDER, *THE ANATOMY OF BRITISH SEA POWER* (1940); MACKAY, *FISHER OF KILVERSTONE* (1973); SUMIDA, *IN DEFENCE OF NAVAL SUPREMACY: FINANCE, TECHNOLOGY AND BRITISH NAVAL POLICY, 1889–1914* (1989).
126. Stockton, *Would Immunity from Capture, during War, of Non-offending Private Property upon the High Seas be in the Interest of Civilization?* 1 AM. J. INT'L L. 930 (1907).
127. *Id.* at 943.
128. Newspaper clippings, Stockton Papers, box 3, folder 6: *Japanese Warships Arrive in Brest; Americans Join French in Welcome*, NEW YORK HERALD TRIBUNE, European ed., July 25, 1907, at 1; Quote from *Stockton Back with Squadron*, unidentified newspaper, vol. xxi, no. 122, New York, Aug. 6, 1907.



129. *Id.*
130. Stockton, *The Use of Submarine Mines and Torpedoes in Time of War*, 2 AM. J. INT'L L. 276 (1908).
131. *Id.* at 284.
132. International Law, Reports of First and Second Committees, Aug. 27, 1908, Naval War College Archives, record group 8, series 2, box 87, file XLAI, 1908–1911, item 1908, no. 83.
133. Report of the 2nd Committee in *id.*
134. *Id.* at 4–5.
135. COOGAN, *THE END OF NEUTRALITY: THE UNITED STATES, BRITAIN, AND MARITIME RIGHTS, 1899-1915*, at 113 (1981).
136. NAVAL WAR COLLEGE, *INTERNATIONAL LAW DISCUSSIONS, 1903, THE UNITED STATES NAVAL WAR CODE OF 1900* (1904).
137. Summary of Suggested Changes, in *id.* at 91–97.
138. Letter from President, Naval War College, to Secretary of the Navy (Sept. 29, 1908), Naval War College Archives, record group 8, series 2, box 87, file XLAI, 1908–1911, item 1908, no. 83.
139. *Id.*
140. Quoted in Stockton, *The International Naval Conference of 1908*, 3 AM. J. INT'L L. 600 (1909).
141. Quotations from National Maritime Museum, Slade Papers (M) 3, diary entries for Oct. 26, 28, Dec. 1, 1908, *quoted in* COOGAN, *supra* note 135, at 113–14.
142. Extract of Letter from Rear Admiral C.H. Stockton (Nov. 18, 1908), with commentary in letter of President, Naval War College, to Chief, Bureau of Navigation (Dec. 12, 1908), Naval War College Archives, record group 8, series 2, box 87, file XLAI 1908–1911, item 1909, no. 4.
143. Slade diary entry, Feb. 5, 1909, *quoted in* COOGAN, *supra* note 135, at 116.
144. Stockton, *Conference of 1908*, *supra* note 140, at 596–618, also published as *Review of the Proceedings of the Conference in London, 1909* PROC. AM. SOC'Y INT'L L. 61–84.
145. *Id.* at 608.
146. *Id.* at 611.
147. *Id.* at 614.
148. *Id.* at 616.
149. STOCKTON, *MANUAL OF INTERNATIONAL LAW FOR THE USE OF NAVAL OFFICERS* (1911).
150. Preface, dated Nov. 1, 1910, in *id.*
151. Undated and unsigned memo, Naval Historical Collection, Naval War College, ms. coll. 56: Stockton Papers, box 2, folder 4. See also *Our New President: Admiral Stockton*, THE GEORGE WASHINGTON NEWS, vol. 1, no. 1, Sept. 1910, at 1–2. Stockton Papers, box 3, folder 7.
152. Stockton, *The Codification of the Laws of Naval Warfare*, 1909 PROC. AM. SOC'Y INT'L L. 117–19.
153. *Id.* at 122.
154. Stockton, *Does the Expression "All Nations" in Article 3 of the Hay-Pauncefote Treaty Include the United States?*, 7 AM. J. INT'L L. 92 (1912), and *Panama Canal Tolls*, 38 NAVAL INST. PROCEEDINGS 493 (1912).
155. *Sees Risk in Weak Navy*, N.Y. TIMES, Feb. 27, 1913, at 5: 4–5.
156. *Id.*
157. STOCKTON, *OUTLINES OF INTERNATIONAL LAW* at v (1914).
158. *Recollections*, *supra* note 2, at 38.
159. *International Law*, N.Y. TIMES BOOK REV., Feb. 7, 1915, pt VI, at 41:2.
160. Stockton, *International Law of the Sea*, 29 THE WORLD'S WORK 706, quote at 706 (1915).
161. *Id.* at 712.

162. See Stockton's handwritten insertions for the 1917 revision in his own copy of the 1911 edition, Stockton Papers, box 5, file 1.

163. Minutes of the Board of Trustees, George Washington University, upon their acceptance of the resignation of Rear Admiral Charles H. Stockton as President of the University, Stockton Papers, box 4, folder 7.

164. Stockton, *Remarks on the Covenant of the League of Nations*, 1918–1919 PROC. AM. SOC'Y INT'L L. 45–51 and *Remarks on the Recommendation for an International Law Conference*, in *id.* at 51–61.

165. Stockton, *The Declaration of Paris*, J. AM. SOC'Y INT'L L., July 1920, at 356.

166. Stockton, *Remarks on the Laws of War*, 1921 PROC. AM. SOC'Y INT'L L. 100, 101.

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168. *Admiral Stockton Dies in Washington*, N.Y. TIMES, June 2, 1924, at 17.

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## Megatrends in the Use of Force

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Anthony D'Amato

AT ANY GIVEN MOMENT IN HISTORY, there are hundreds if not thousands of political, cultural, and economic trends that an observer can identify. Some of the trends will be short and of no consequence, some long but also inconsequential, and many of them just “noise,” but there will also be a few significant megatrends. A later historian has an easy job: she looks back at the visible long-term trends that changed the world. But how can we identify the significant megatrends of today? As we approach the end of the twentieth century, millenary thinking encourages one to try. I will suggest some megatrends that I believe will impact most significantly on the future use of force. Yet in contributing to a volume that is part of a historic and enduring series, I am troubled by the likelihood that a future reader may be interested in my essay only to see what later developments blindsided me. Of course, some things could possibly happen that would make any such enterprise, not just mine, quite obsolete: invasion from another galaxy, conquest by deadly viruses, or more benignly, cheaply converting water into energy. But macro-convulsive events aside, and with more than customary trepidation, I offer here a discussion of some of the megatrends that I see will probably have the greatest impact on the future use of force.



## **The Global Market**

The demise of Marxism-Leninism in the former Soviet Union was only the most visible effect of a worldwide surge to capitalism and free markets. Are there any “undeveloped” nations today? Perhaps there are a few, but nearly all nations rightly regard themselves as “developing” or “developed.” Former political “hot spots” all over the world have cooled down as the people in those localities have increasingly realized the foolishness of engaging in political fights while their neighbors in peaceful countries are busy accumulating wealth. I have in mind South Africa (how else account for the incredible dismantling of apartheid?), Northern Ireland, and even the Middle East, which is fitfully moving toward accommodation.

As prosperity spreads, we hear commentators saying that war is economically irrational and hence cannot or will not occur. The problem is that popular writers were saying the same thing in the years preceding the outbreak of World War I. Industrial Europe was humming along in 1907–1914, trade was flourishing, and wars seemed a thing of the past. Was there a difference between those times and today with respect to the outlook for war? I can suggest two interrelated differences.

One is colonization. Prior to the First World War, the European powers, no matter how peaceful vis-à-vis each other, were engaged in aggrandizement of their empires abroad. Colonial wars were being fought in Africa and Southeast Asia even as the home countries appeared peaceable within Europe. Perhaps the submerged competition for empire, combined with a continuing taste for foreign military adventurism, were long levers propelling the mother countries toward war. Looking back on it, it seemed to have been a case of the colonial tail wagging the home country dog.

A second difference concerns convictions about the peace thesis. Although it was popular to claim that wars were economically irrational, there were perhaps too many skeptics in high places. The skeptics were justified at least in believing that it had not been proven that nation A would become richer by trading with nation B than conquering and subjugating B. Perhaps colonization was the basis for this belief; after all, the major nations were engaged in colonization at a time when their home economies appeared to be prospering. Although there may not have been any causal connection between colonization and prosperity, when two major trends coexist many people assume that they are correlated. It was intellectually hard to make a case that a nation could be better off without colonies. To be sure, nations without colonies such as those that made up the Austro-Hungarian Empire, were

thriving prior to World War I, but this could be rationalized as derivative or spillover prosperity from colonizers such as France, Germany, and the Netherlands.

Today, in contrast, colonialism has ended. I would like to show by some statistics the generally accepted proposition that the peace thesis has been proven by the experience of Japan.

Japan for the last hundred years has been a nation of processors, importing raw materials and energy and exporting finished products. Japan's prosperity in the processing business was rudely disrupted in the aftermath of World War I, when European nations, and eventually the United States, erected high tariff barriers. No longer able to sell its products profitably in these two markets, Japan was plunged into a severe recession. Control of its economically hapless government soon passed into the hands of demagogues and militarists. Their agenda was to substitute force for trade: an export market for Japanese goods would be created by force in China, to be followed up by forcible control over imports from Southeast Asia. The "export" part of the story got off to a good start with the immediate conquest of Manchuria, unopposed by the League of Nations. But soon the Japanese Army was confronted with sophisticated guerrilla tactics in the rest of the vast Chinese empire. It got bogged down in China through the rest of the 1930s and for the entire duration of World War II. Far from being able to generate a captive Chinese market for Japanese products, the only "demand" created was that for weaponry and ammunition on the part of the Japanese army—a demand that Japan had to satisfy for free.

However, it is the "import" side of the story that furnishes the more interesting and decisive demonstration of the peace thesis. (The case of Japan's China adventure was not conclusive, in that it could be blamed on military shortcomings and poor generalship rather than economic irrationality.) Prior to 1940 Japan had to import 83 percent of its iron-ore requirements, 40 percent of its steel, 80 percent of its oil, and 100 percent of its aluminum. Then it invaded Southeast Asia, with immediate and astounding success. Military dictatorships were set up in Hong Kong, the Philippines, Malaya, Singapore, the Dutch East Indies, Indochina, Siam, northwest New Guinea, Burma, and numerous South Pacific islands. But surprisingly, exports from these newly colonized territories to Japan steadily declined from 1942 to 1945, even though in 1942–1943 there was only sporadic Allied interference with Japanese shipping.<sup>1</sup> By 1945 Japanese coal imports were at 8 percent of their 1941 level, iron ore at 5 percent, iron and steel at 18 percent, and rubber at 26 percent. Also, within the conquered lands themselves, by 1945 tin production in Malaya had declined to 24 percent of its prewar level, and in the Dutch East



Indies oil had collapsed to 5 percent of its prewar output.<sup>2</sup> Military conquest had thus contributed both to a sharp reduction in the production of raw materials in Southeast Asia and a near-collapse of Japanese imports of these raw materials.

Contrast this situation with that of the present day. The efficacy differential of trade over war is such that Japan now imports all the raw materials it wants, and the profitability of its processing industry has resulted in an enormous capital trade surplus. The lesson learned not only by the Japanese public but also by people throughout the world is that everyone can become materially richer if their nations trade with other nations instead of trying to conquer and control them. It is better for A to trade with B than to own B.

Trade increases the material wealth of both A and B irrespective of the sophistication of their internal economic systems. If A is very rich and B very poor, and even if A can produce more efficiently every single item that B can produce, the Doctrine of Comparative Advantage nevertheless assures that both A and B will become better off by trading with each other.<sup>3</sup> As Paul Krugman puts it, "[A] country whose productivity lags that of its trading partners in all or almost all industries will export those goods in which its productivity disadvantage is smallest."<sup>4</sup> The attraction of trade to A is inescapable: it becomes more wealthy itself while driving up the wealth of its neighbor B, thus giving B less incentive to prey upon A.

Despite this reality, history has shown that a war can break out no matter how economically irrational it might be. Our baser instincts tend to control our actions; our minds, swept along, provide the necessary rationalizations.<sup>5</sup> When mass emotion has been aroused by appeals to nationalism, "God and Country," religious fundamentalism, *lebensraum*, demonizing one's neighbors, and the like, then nations have resorted to war. (A recent example was the soapbox orators' appeals in Former Yugoslavia, turning a previously peaceful accommodation among Croats, Muslims, and Serbs into mutual hatred and civil war. The result was nothing short of economic disaster for all parties, which is probably one reason why the nations of the European Union were not particularly motivated to intervene.) Emotions such as these cannot be trumped by appeals to reason. To block a militant emotion, a countervailing emotion must be evoked.

### Emotional Value of Life

I believe that the most significant megatrend of the twentieth century is the sharply increasing value we place on individual human lives. This may be a



strange proposition to assign to a century in which more people have been killed than ever before (the two world wars, Stalin's and Hitler's genocides, etc.) Yet it was largely as a revulsion against those killings that the post-World War II era witnessed a seachange to international human rights: from the Universal Declaration of Human Rights and the Genocide Convention to the recent Rights of the Child Convention (ratified by more States, and more quickly, than any treaty in history). But revulsion against killing aside, I think the two underlying causes of the increasing value placed on human life are population dynamics and television.

**Population Dynamics.** The Malthusian doomsayers of the 1970s, such as Paul Ehrlich, were right when they said that a geometrically increasing world population would render human life very cheap, but they were wrong in predicting a population increase. To be sure, one can still make a vivid claim that there is a global population explosion. I recently added up demographic statistics that show us to be adding to the world's net population, *each year*, a number equal to the combined populations of New York City, Los Angeles, Chicago, Mexico City, Rio de Janeiro, London, Paris, Berlin, Vienna, Rome, Moscow, Bombay, Melbourne, Beijing, Shanghai, and Tokyo. How can the world continue to absorb all these new people each year? The world's population, now at 5.7 billion, will increase to about 9.4 billion over the next fifty years. Are we not already witnessing the cheapening of human life, sadly exemplified in genocides in Cambodia, former Yugoslavia, and Rwanda-Burundi?

Despite overall population growth, the megatrend goes the other way. For the first time in human history the developed nations are experiencing a population decline. United Nations statistics compiled in 1995 show that the fertility rate of women was equal to or less than the replacement rate (2.1 children per woman) in countries having 44 percent of the total world population. By 2015 it is projected that countries containing two-thirds of the world's population will show a zero or negative replacement rate.<sup>6</sup> The lowest fertility rates are in Italy (1.24), Spain (1.27), and Germany (1.30). Hong Kong (1.32) and Japan (1.48) are surprisingly low, as are Russia (1.53), South Korea (1.65), Singapore (1.79), China (1.92), and Thailand (1.94). The United States is slightly below the replacement rate (2.05). As the developing countries become developed, they will clearly head in the direction of China, Thailand, and Japan. Just a decade or two ago China had a population crisis—no longer. Among the factors accounting for the population decline are women's education (which has been called the world's most powerful

contraceptive) and a world decrease in male sperm count (not fully understood, but perhaps due to increasing use of pesticides in agriculture and medications in animal farming).

If a Malthusian surplus of people theoretically renders human life cheap, a shortage of people is rendering human life increasingly dear. Since I am talking about value, anecdotal evidence can be useful. In past centuries and through much of the twentieth century, parents could “tolerate” the loss of two or three sons in a war; there were more siblings back home. Today there is no tolerance for the loss of a single life in war. Many countries are demilitarized, and with the increase in democracy throughout the world, public opinion wants nothing to do with military adventurism. American foreign policy in Bosnia today, where American troops are stationed along with other NATO forces, is dominated by a fear of “body bags” returning home. Moreover, the inevitable fatal accidents that occur in the course of military training and exercises are now getting enormous media attention; a few decades ago they were not even noticed. American special forces sent abroad for “police action,” such as in Somalia a few years ago, are schooled in the doctrine that individual survival comes first: don’t begin a mission unless you have a safe individual “exit strategy.” Gone, maybe forever, is the World War II ethic of individual sacrifice to further some generalized military policy (though some fundamentalist countries can still muster fighting forces under the guise of religious obligation). During the Second World War, the number of lives lost to “friendly fire” was not revealed; parents were notified that their sons had been killed in action. Today, pervasive media coverage makes it difficult to hide a tragic loss due to friendly fire, and when any is revealed, public reaction is instantaneously critical.

**Television.** First came motion pictures, then television. They have changed human life on earth, not just because underdeveloped countries can see how people live in developed countries and want to get there too, and not just because global news makes faraway places and events seem close and relevant. Rather, what is important is the creation by the entertainment media of empathy for other people’s lives. The stories told on television—the series and “made-for-TV” films—feature the individual, and they use audio-visual tricks and special effects to establish empathy between the viewer and the image of a person on the screen. We are caught up in the lives of these actors in their fictional stories, and we share their hopes and fears. Viewers learn to *care* about what happens to these actors in their compelling dramas. David Hume in the eighteenth century discussed the “moral sentiment”—that facility of people to sympathize (a better word for his purposes perhaps would have been



“empathize”) with the inner feelings of others when they recognize the external signs of those feelings. A stranger who is obviously in pain can evoke a sort of virtual pain in the observer. Of course, Hume knew nothing about moving pictures; he lived before the invention even of photography. Perhaps he would have been astounded if he could have seen how easy it is for people to empathize with motion pictures of other people, even when they know those other people are only acting.

Soldiers, of course, are trained to disregard the human feelings and sentiments of the enemy. War propaganda often demonizes enemy combatants, downgrading the enemy to a subhuman level. Group values are promoted at the expense of individual values. For example, if we look back at the movies of the Second World War, we find that most of them feature an ensemble of leading players (in contrast to the superstar of today), and usually one of them dies in action in the course of the picture. Although the death is temporarily mourned, it is soon overshadowed by the military glory of the successful ending. Hollywood did its best to emphasize group values, but it was not easy to do. There is an underlying logic of motion pictures and television that makes the images and stories most compelling when they portray the drama of an individual, empathetic hero. When John Wayne was in a World War II movie, he could not die (if he did, the box office would die too). His movies suggest an uneasy directorial struggle between group heroics and Waynish heroics, and somehow his films viewed today seem less realistic as war cinema because of his strong presence.

**“Smart” Weapons.** The development of “smart” weapons that home in on their targets means that the mass and indiscriminate killings of World War II are no longer a necessary part of warfare. The number of personnel in national army groups, has accordingly decreased; smaller-sized “mobile,” “elite,” and “special forces” units are taking the place of armies, divisions, and regiments. The new soldier—more mechanized, trained, and deadly—is correspondingly more valuable than his or her historical counterpart. The American F/A-18 Hornet, both a fighter (F) and attack (A) aircraft, can carry up to three tons of smart bombs and missiles.

A striking difference between World War II and today is the case of the aircraft carrier. In 1940–1945 it was the single most expensive and effective weapon, and it was nearly invulnerable. Today its cost and effectiveness are still enormous when used against many adversaries; what has changed is vulnerability. The U.S. carriers in the Seventh Fleet, shuttling opportunistically between the Middle East and the Formosan straits, are a



formidable presence in both theatres. Yet the carrier is virtually helpless against a nuclear missile attack. A single missile discharged from a submarine many miles away can obliterate an aircraft carrier. The carrier is like Goliath, who was the most powerful individual of his time and place: although retaining his power, he abruptly became vulnerable to David's slingshot.

It is mostly a historical coincidence that smart weapons have been developed at the same time that human life has become more valuable. The two trends work hand in hand, but they have very little intrinsic connection. Scientists and technicians have always had sufficient motivation to develop accurate and smart weapons; they did not need any extra humanitarian motives.<sup>7</sup> Moreover, there are contrary trends. The same scientists and technicians have developed nuclear weapons of unprecedented and indiscriminate destruction. But a nuclear missile can be accurate or not, depending on its use. It can be thought of as having pinpoint accuracy if launched upon an aircraft carrier at sea, while a counter-value attack upon a city is the antithesis of military accuracy. Another contrary trend is the blurring of the distinction between civilian and combatant. Guerrilla fighters who wear civilian clothes invite their opposition to attack indiscriminately—as was discovered, among other places, in Vietnam. And with extreme perversity, guerrillas can turn on defenseless people, as did the Shining Path in Peru in recent years. Much of the killing and the setting up of “detention camps” in the former Yugoslavia in the 1990s was traceable to the lack of military uniforms or insignia on many of the soldiers, a legacy of the effective resistance movements in Yugoslavia during World War II.

Smart weaponry means that governmental officials are not totally safe if they initiate war. As a result, wars of international aggression have become extremely unlikely. Most wars since World War II have been limited, internal wars (Korea, Vietnam, Nicaragua, Yugoslavia) or border disputes. Iraq's attack on Kuwait was the anachronism that proves the rule, and even then from Saddam Hussein's point of view it was aimed at a territory that he said historically belonged to Iraq. Perhaps the most instructive example is, again, that of Japan. Not only is it demilitarized but also it has decided that armies are economically wasteful. Recently, as North Korea proceeded to develop a nuclear capability, Japan appeared to view the situation with equanimity. The United States seemed to be far more worried about nuclear proliferation into North Korea than was Japan, even though Japan was nearby and vulnerable. If the North Korean government thought that its internal economic problems could be solved by diverting scarce resources to achieve a nuclear capability, they could have learned from De Gaulle's *force de frappe*. France's nuclear

weapons appear to have done absolutely nothing for France's well being or life style; instead, the program has been immensely costly and remains so (as France continues to have to bribe the Polynesians to allow an occasional nuclear testing program in the South Pacific). France's neighbor Germany has achieved greater clout in the European community by not diverting any of its manufacturing energy to nuclear weapons.

### Clash of Civilizations?

Irrational reasons that can impel a nation to war include religion and nationalism, which are of course the two most historically important factors leading to war. Nationalism can be held with the fervor of religious commitment (consider the Rousseauian notion of "civil religion"), yet I think that nationalistic wars have peaked in the nineteenth and twentieth centuries. It was never an easy matter for governments to stir up their citizens to go to war, and now that government elites are looked upon with more distrust than ever—coupled with the increasing value accorded to human life—I suspect that wars of aggression between nations will become increasingly rare. Religion, cutting across national boundaries, is a more likely candidate to precipitate international conflict.

Samuel Huntington identifies the major contemporary civilizations as Western, Confucian (Sinic), Islamic, Japanese, Hindu, Latin American, and perhaps African.<sup>8</sup> All of these have a distinctly religious core. His article in *Foreign Affairs* published in the summer of 1993, entitled "The Clash of Civilizations?" instantly became a focal point of discussion around the world. Perhaps much of the attention accorded to the article was due to the fear evoked by the possibility of a military clash between two huge civilizations, plunging the world into a genocidal war that could dwarf the first two world wars. The problem was that Professor Huntington never defined what he meant by "clash." That word can refer ambiguously to encounters ranging from the cultural clash of rock music and country and western music, to the religious clash of two professors of theology debating alternative interpretations of the Dead Sea Scrolls, to the culture shock of Western women visiting fundamentalist Muslim countries and seeing obvious signs of female subordination to men, to outright military encounters, as among the Croats, Muslims, and Serbs in the Former Yugoslavia.

Professor Huntington followed up his article with a book, whose title, unlike that of the article, did not end with a question mark. After considerable historical material and various statistical tables, *The Clash of Civilizations and*



*the Remaking of World Order* ends with a possible scenario of a global war breaking out in the year 2010. China claims that it will establish full control over the South China Sea; “The Vietnamese resist and fighting occurs between Chinese and Vietnamese warships.”<sup>9</sup> The United States dispatches a carrier task force to the area. China responds by launching air strikes against the task force. Japan sides with China, one thing leads to another, and soon Russia, Europe, and “most of Islam” are drawn in to a “global civilizational war.” Professor Huntington concludes, “If this scenario seems a wildly implausible fantasy to the reader, that is all to the good.”<sup>10</sup> But the first question that a reader should ask is not the implausibility of the scenario (after all, there are millions of implausible scenarios that people could envision), but how it relates to Professor Huntington’s thesis. China and Vietnam are part of one civilization as defined by Professor Huntington—the Sinic civilization.<sup>11</sup> Thus, if his scenario begins as a conflict between China and Vietnam, it is not a clash between civilizations but a clash between two States having the same civilization. Such a clash may or may not occur; indeed, anyone could predict a clash between any two contiguous States and be as likely as Professor Huntington to be right or wrong. It is surprising that Professor Huntington would choose as the linchpin scenario of his book a conflict that has nothing to do with the thesis he is advocating. Yet it is not an isolated example of the sprawling nature of his thesis. In many previous chapters he recounts clashes within civilizations, especially focusing on wars in Islamic countries. The recent wars between Iran and Iraq, and between Iraq and Kuwait (and Saudi Arabia, ostensibly the next target had Saddam Hussein succeeded in holding on to Kuwait), are clearly wars within a civilization.

There is some plausibility in the idea that if an irrational war is to occur, the irrational reason for the war may be rooted in religions or civilizations. However, picturing *how* it is supposed to occur is really the crux of the matter. Professor Huntington may have felt the logical imperative to supply at least one scenario in his book so as to answer the question of *how*. But the scenario he chose illustrates nothing so much as the poverty of his thesis. The thesis boils down to saying that wars can occur within civilizations as well as between them. One then has to ask what civilizations have to do with it.

### The Corporate World

With the accelerating global market, multinational corporations are increasing in size and influence. They are not downsizing. Corporate mergers and acquisitions throughout the world appear greatly to exceed corporate



divestitures and spin-offs, not only for reasons of economic efficiency but also because of the increasing separation of owners and managers. Shareholders in corporations rarely exercise meaningful control of operations; instead their fiduciaries—corporate executives and managers—have a free hand. These managers try to hold onto and augment their power, which means, effectively, that companies will grow even if growth is not in the economic interest of the shareholders.

Governments, on the other hand, are downsizing. With the decline of international wars, they have less justification for taxing their citizens; as tax revenues level off or decline, government services are cut back or privatized, and as a consequence the pressure for downsizing increases.

If we compare multinational corporations with governments, we find not only that the former are upsizing while the latter are downsizing but we also find that many corporations have assets that exceed those of many governments. Perhaps the majority of the approximately 190 States in the world today do not collect as much as eight billion dollars a year in taxes—the net income of General Electric Corporation.<sup>12</sup> Microsoft Corporation, which has been in existence for less than a quarter of a century, currently earns \$3.5 billion a year, more than the tax revenues of many States that have been in existence for centuries.<sup>13</sup> There are other considerations useful in comparing multinational corporations with government.

*Corporations tend to exert far more power over their employees' daily lives than governments exert over their citizens.* (True, an employee can quit her job just as a citizen can renounce her nationality, but there is no safe haven in either case—one simply goes to the next corporation or the next country.)

Unlike governments, *corporations do not have a specific territory to defend.* They branch at will throughout the world, setting up offices, factories, service centers, etc. More importantly, they establish subsidiaries in many countries. Technically a corporation's legal identity is dependent upon its charter in its original State of incorporation,<sup>14</sup> however, multinational corporations these days—in the unlikely event of hostility from the original State of incorporation—have the hydra-like ability to phase out their main office and reincorporate in another State.<sup>15</sup> Peter Drucker has called attention to the fact that multinational corporations are slowly becoming transformed into what he calls "transnational corporations."<sup>16</sup> Whereas a multinational corporation sets up subsidiaries that are essentially clones of the parent company, a transnational corporation only localizes selling, servicing, public relations, and legal affairs; parts, machines, planning, research, financing, marketing, and pricing are conducted in specialized locations, so that a given subsidiary in a

given country might receive parts from all the other subsidiaries and simply assemble the final product locally. Thus, if any government takes over any of the subsidiaries, it will take over an essentially worthless operation; the corporation will simply cease shipping the component parts to that taken-over subsidiary. Drucker says “successful transnational companies see themselves as separate, nonnational entities.”<sup>17</sup> As global financial markets become consolidated (twenty-four-hour trading worldwide), there will be less reason for US corporations to maintain their US nationality. They may gain a tax advantage by moving to a foreign haven, and there might be little loss in abandoning their American identity as far as share prices and financial liquidity are concerned.

Unlike governments, *corporations are not burdened with social responsibility*. A government—even the most dictatorial—believes that the welfare of its citizens is its responsibility. In contrast, corporations will not take on any social responsibility—even as to their own employees—that would result in a loss of long-term profitability.<sup>18</sup>

*Nearly every corporation has its own security personnel*. The number of private police personnel employed in the United States greatly exceeds the number of public police officers. Private security persons are usually armed and can legally use force within their corporate jurisdictions. In addition, there are many private companies that lease temporary security persons to corporations to police special events. As I walk to my office, I sometimes see a Northwestern University police car. It is painted the same colors as a regular police vehicle and has Mars lights on its roof. The persons in the car are uniformed like regular police and carry weapons. The word “POLICE” is painted on the side—and underneath it, in a somewhat smaller font, “NORTHWESTERN.”

*The Internet has vastly enhanced the power of corporations*, not just because it allows them to communicate inexpensively with all parts of their production and marketing processes, but because it gives them a new ability which is now in its earliest stages. I am talking about the trend toward electronic banking. Banks already engage in wire transfers of money, but when corporations start doing it among themselves—bypassing banks in the process—the result will be to take monetary control out of the hands of governments. A nation-state will not much longer be able to block its currency or restrict capital movements. It is hard to exaggerate the immense loss of power that governments will experience when international monetary transfers are completely privatized.

Corporations are increasingly *outsourcing many of their functions and modes of production*. They regard themselves as being in the knowledge business, not the production business. In addition to advertising, which traditionally has been



placed through outside agents, outsourcing includes plants and factories, payroll, and most recently employees. Specialized companies with names like "Manpower," "Labor Ready," "Account Temps," "Billing Concepts," "Catalytica," "Data Processing Resources," "Staff Leasing," and "AccuStaff" now provide U.S. corporations with temporary employees who are ready to handle just about every function that the corporation used to provide. The more functions that corporations outsource, the less vulnerable they are to government regulation, unionization, seniority demands, and natural disasters.

The huge power and confined responsibility of multinational corporations lead to the speculation that they, and not necessarily States, may become the major warring antagonists of the future.

A corporation lives on profits. Although the path of least resistance toward profitability is raising prices, the obstacles on that path are competition and substitution by consumers of alternative goods or services.<sup>19</sup> A corporation can do little about the "substitution effect," but it certainly can spend a great deal of its energy combatting competitors. The marketplace prefers that this "combat" take the form of increased productive efficiency. But it can also take the form of monopolization and destruction of the competitor. Destruction can be accomplished by predatory pricing (outlawed by U.S. antitrust statutes, but when we are talking globally, there is opportunity for predatory pricing in other countries who either do not have antitrust laws or enforce them laxly). Monopolization is the preferred route. A company receives a limited term monopoly for some important forms of intellectual property such as copyright and patents, and an unlimited term for others such as trademarks. Trade secrets in many countries receive forms of judicial protection. However, intellectual property is a benign form of monopolization, because it strikes a legal balance between rewards innovation and temporal limits on that innovation.

The more crude form of monopolization is by use of stealth and force. Industrial spying is big business. Manufacturing processes, trade secrets, and software engineering are some valuable industrial targets for corporate "intelligence" operations. However, we have not yet seen the overt use of force against competitors on any significant scale, even though recently there have been numerous accounts of specific assassinations of corporate executives and entrepreneurs in Russia and in some of the other States of the Commonwealth of Independent States.

What if someday corporations add military force to their outsourcing, and organizations spring up with names such as "Mercenaries, Inc.," "Battle Ready," "Armada Resources," "Guerrilla Temps," and "Spy Concepts"? These



outfits would do dirty work for hire. One such organization already exists, although so far it refuses to be hired by private corporations and limits its services to governments. The organization, based in South Africa, is called "Executive Action."<sup>20</sup>

Corporate "greed" and "rapacity" in the business "jungle" are part of everyday language. As business enterprises exceed governments in assets and power around the globe, will we begin to see forceful manifestations of these terms? The history of the British East India Company may shed some light on the matter. For two and a half centuries it enriched its stockholders, and its tariffs fueled the expansion of the British parliament from a small organization to a powerful central government.<sup>21</sup> The company was founded on December 31, 1600, by a charter from Queen Elizabeth that gave it exclusive trading privileges with the East Indies. Apart from being allowed to arm its vessels, the company was barred from engaging in any forms of conquest or colonization. However, as the years passed, it increasingly got involved in the use of force. At first force was used defensively—against depredations from Portuguese and Dutch vessels and outposts in India and the Orient. But then, under the theory that the best defense is a strong offense, the British East India Company increasingly engaged in military campaigns, becoming a colonial arm of the British government until its entire absorption by that government in 1857. Perhaps if there had been no competition from Portugal and Holland the picture would have been a peaceful one of trade and enrichment. But competition is endemic in business. Standard economic theory says that "pure" competition forces prices down to the point where profits vanish entirely. Hence, competition is an ever-present threat to the continued existence of corporations.

The military clashes between the British and Dutch East India companies in the seventeenth and eighteenth centuries in Southeast Asia were made possible by the weakness of local governments in that area. Today, in most parts of the world, governments are still strong enough to deter corporations from resorting to armed force in the battle against their competitors. But as governments downsize and corporations become more powerful, the situation may change.

If the situation changes, will "international law" apply to intercorporate warfare? Or will there be a new "intercorporate law," analogous to international law? If such law arises, who will enforce it? Perhaps the largest multinational corporations will set up a global board of governors with enough power to prevent smaller competitors from using force, thus insulating themselves from competition. But the new law they promulgate and enforce

may not be informed, as international law is, by elementary notions of morality. International law reflects many moral norms (e.g., military humanitarian law, the laws of war, laws of state responsibility for torts, and the general principle of the equality of states), but perhaps that is because the nation-states that have generated that law are themselves the moral repositories of their citizens. Corporations, as I have mentioned, have no moral imperative; their goal is simply to make profits. Hence, a world intercorporate law may be morally barren, unequal in its application, dictated from above, and unchangeable from below. We could be heading toward world fascism. I hope I am wrong, but it doesn't hurt to be vigilant.

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### Notes

1. Japanese merchant marine tonnage declined (existing stocks plus new ships built minus losses on the high seas) moderately in 1941 and 1942, more steeply in 1943, and then precipitously in 1944 and 1945. TAKAFUSA, LECTURES ON MODERN JAPANESE ECONOMIC HISTORY 1926–1994, at 113, table 3.3 (1994).

2. PONTING, ARMAGEDDON 121–22 (1995).

3. The Doctrine of Comparative Advantage was suggested in the writings of Adam Smith and was articulated more fully by David Ricardo in 1817. The mathematics works roughly as follows. State P can produce rowboats and canoes more efficiently than Q can produce either one. Suppose P and Q utilize all their labor in producing just these two products. P can produce ten boats or five canoes a day utilizing all its labor. Q can produce six boats or one canoe a day. Since P is the more efficient producer both of boats and canoes, how can trade mutually benefit both P and Q? In the following way: Prudence owns one canoe in P. Within P, she can exchange her one canoe for two boats (because, within P, it costs twice as much to produce a canoe than a boat). She then travels to Q and exchanges her one canoe for six boats (because within Q, it costs six times as much to produce a canoe than a boat). With her six boats, she travels back to P, and exchanges the six boats for three canoes. Then she takes the three canoes back to Q, where she can exchange them for eighteen boats. Back to P, she exchanges her eighteen boats for nine canoes, and so on back and forth until Prudence is the richest person in both countries.

In practice, of course, this does not happen. Everyone will soon catch on to the international arbitrage that Prudence is practicing. Traders will export canoes from P into Q, and import boats from Q into P. Manufacturers in P will conclude that so long as trade is going on with Q, they will be better off producing only canoes. Conversely, manufacturers in Q will conclude that they are better off producing only boats. The canoe manufacturers in P and the boat manufacturers in Q will be producing at their own optimum efficiency; everyone in P and Q will be better off because the “price” of a canoe will stabilize at somewhere between two and six boats, and the “price” of a boat will stabilize at somewhere between one-half and one-sixth of a canoe. These prices will be better for the customers in both P and Q than the prices they would have had to pay if there was no international trade between P and Q. (Nothing changes in this example if we introduce money as an exchange mechanism.)

4. KRUGMAN, POP INTERNATIONALISM 91 (1996).

5. I am collapsing a lot of psychology here. It appears that our cerebral cortex, in an attempt to maintain verbal control over our actions, convinces *itself* (that is, convinces ourselves) that it,



and not our baser emotions, is in command. We accept these rationalizations (indeed, we have no choice, because our own minds have furnished them). In fact, we are not in rational control of our actions and decisions, but we think we are. Now if we multiply this phenomenon by hundreds of thousands of minds within a State, and the "head" of government whips up mass emotions to resort to military force while at the same time providing verbal rationalizations for the need to do so, we have war hysteria that tends to sweep along even the most rational thinkers.

6. Crossette, *How to Fix a Crowded World: Add People*, N.Y. TIMES, Nov. 2, 1997, at sec. 4, p. 1.

7. See generally GEORGE & MEREDITH FRIEDMAN, *THE FUTURE OF WAR* (1996).

8. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 45-47 (1996).

9. *Id.* at 313.

10. *Id.* at 316.

11. *Id.* at 45: "The term 'Sinic,' which has been used by many scholars, appropriately describes the common culture of China and the Chinese communities in Southeast Asia and elsewhere outside of China as well as the related cultures of Vietnam and Korea."

12. The approximation in the number of States is due to the difficulty of categorizing some entities as States, e.g., Vatican City, the Isle of Man, Puerto Rico.

13. Microsoft was founded in 1975.

14. *Barcelona Traction Case (Belg. v. Spain)*, 1970 I.C.J. 3.

15. Some U.S. tobacco companies have recently begun to move their main offices out of the United States in the face of increasing governmental regulation of cigarette smoking. Although they are still U.S. companies, it would not be surprising some day to find that they have been quietly phasing out their U.S. identity and abandoning their U.S. nationality.

16. Drucker, *The Global Economy and the Nation-State*, 76 FOREIGN AFFAIRS 159 (1997).

17. *Id.* at 168.

18. Some Japanese corporations have professed a responsibility to their employees' welfare even at the expense of profitability. But in the past few years, with the severe downturn in the Tokyo stock market, many of those same corporations are revisiting their policy of corporate benevolence. Globally, there are some corporations that have taken short-term losses to support some socially benevolent policies, but I know of no corporation (other than not-for-profit "corporations") that will accept a decline in long-term profitability in order to engage in a program of social welfare.

19. Where substitution is not possible, there is a "natural monopoly" that governments are quick to regulate, such as the provision of electricity, water, mail, and telephone service. However, the recent movement to deregulation has seen competition for the post office (the Netherlands has entirely privatized its post office, while other countries have developed private air courier services), a proliferation of competing telephone companies, and the beginning of other alternatives (bottled water, home generators).

20. This company was described on the CBS News show "Sixty Minutes" under the heading "Dogs of War," aired on June 1, 1997. For a transcript, contact CBS News, 524 West 57th Street, New York, NY 10019.

21. See generally LAWSON, *THE EAST INDIA COMPANY: A HISTORY* (1993).



# III

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## The Universality Principle and War Crimes

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Yoram Dinstein

### I

ONE OF THE MOST FUNDAMENTAL TENETS of international law is that it determines the permissible limits of the jurisdiction of States.<sup>1</sup> While issues relating to the exercise of State jurisdiction may extend to every aspect of human conduct, the crux of the matter is criminal jurisdiction.<sup>2</sup> Criminal jurisdiction is vested in a given State only when there exists between that State and either the specific offense or the alleged offender a legitimate link, that is to say, a link which is legitimate in the eyes of international law. In the absence of such a legitimate link, the State is not entitled to assert criminal jurisdiction.

Five principles have emerged in international law as legitimate bases for the exercise of the criminal jurisdiction of States over alleged offenders.

- *Territoriality*, namely, the fact that the offense was committed within the territory of the State asserting jurisdiction (including ships and aircraft registered therein). Although this is ostensibly the simplest base of criminal jurisdiction, it must be appreciated that the question of whether an offense actually takes place within the territory is not always easily answered. Above

all, it is difficult to determine when an act committed outside—yet having effects inside—the territory comes within the scope of legitimate criminal jurisdiction.<sup>3</sup>

- *Nationality of the alleged offender* (or “active personality”), namely, the fact that the person charged with the offense is a national of the State asserting jurisdiction. In most instances in which criminal jurisdiction is exercised by a State, the circumstances would satisfy both the territoriality and the active personality principles, inasmuch as the criminal act is perpetrated by a national within the geographic confines of the home country. Hence, the real need for invoking the active personality principle *per se* arises chiefly when the offense is committed by a national extraterritorially. The active personality principle usually also covers non-nationals serving the State in different capacities (such as members of the diplomatic service or of the armed forces), and at times it is even extended to permanent residents.

- *Nationality of the victim of the offense* (or “passive personality”), namely, the fact that—irrespective of the *situs* of the offense and the nationality of the perpetrator—the victim is a national, or conceivably even a permanent resident, of the State asserting jurisdiction. Strong opposition has often been expressed against the passive personality principle when standing alone, *viz.*, when a national of State A is prosecuted by State B for criminal activity affecting nationals of State B carried out within the boundaries of State A (or even State C).<sup>4</sup> All the same, in at least some settings the passive personality principle is too well entrenched in State practice today to be seriously contested.<sup>5</sup>

- *Protection of certain vital national interests of the State*, namely, authorizing a State to exercise criminal jurisdiction irrespective of location or nationality (even when the alleged offenders are foreigners and they acted extraterritorially). The “protective” principle is circumscribed to acts against the national security of a State; counterfeiting its currency, national emblems, seals or stamps; forgery, fraud or perjury committed in connection with official documents, especially passports and visa permits; and improper use of or insult to the national flag.<sup>6</sup>

- *Universality*, namely, “the authority of the State to punish certain crimes wherever and by whom[soever] committed.”<sup>7</sup> This authority, which is vested in every State regardless of territory and nationality, is limited to the exercise of jurisdiction over *delicta juris gentium* (i.e., acts defined as crimes by international law). The view that the universality principle encompasses “common crimes such as murder,” although shared by several scholars, is not in conformity with customary international law.<sup>8</sup> Had the universality principle been applicable to a broad range of ordinary crimes, there would be no *raison*

*d'être* for the other bases of jurisdiction. After all, universal jurisdiction's "limitless scope renders all other forms of jurisdiction superfluous."<sup>9</sup> The universality principle must be looked upon as an exceptional measure granting the State special extraterritorial powers. It is limited to specific offenses defined by international law, and it must be exercised strictly in accordance with limitations imposed by that law.

Actually, the universality principle does not apply in an automatic fashion to all international offenses, although there seems to be a presumption today in favor of such application.<sup>10</sup> A prime example of an international treaty, which defines an international offense yet explicitly adheres to the territoriality—rather than the universality—principle, is that of Article 6 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.<sup>11</sup>

## II

The universality principle is strongly rooted in customary international criminal law. The incontrovertible "prototype"<sup>12</sup> is the age-old law for the suppression of piracy (currently codified in Article 105 of the 1982 United Nations Convention on the Law of the Sea).<sup>13</sup> Over the last few decades, universal criminal jurisdiction has been extended to numerous other offenses by conventional international law (see *infra*), and in at least some instances the extension has in all likelihood already crystallized into generally binding custom.

The proposition that belligerent States are accorded an international legal right to prosecute members of the enemy armed forces charged with war crimes has long been doctrinally recognized;<sup>14</sup> and was authoritatively restated in the early part of the twentieth century.<sup>15</sup> It was reaffirmed in connection with the horrendous war crimes of World War II, even prior to the postwar trials.<sup>16</sup> These trials have had a salutary impact on the progressive development of international law in general (e.g., insofar as the evolution of the separate concept of crimes against humanity is concerned).<sup>17</sup> One of their invaluable achievements is that the postwar trials removed any plausible doubt that might have lingered about the practice of States confronted with war crimes. The trials established, first and foremost, that all belligerents into whose hands war criminals have fallen can exercise concurrent jurisdiction.<sup>18</sup> The trials further demonstrated that belligerent States have jurisdiction over war crimes perpetrated by enemy civilians as much as by members of the enemy armed forces.<sup>19</sup> Additionally, the trials made it plain that a belligerent State is entitled to bring to justice not only enemy nationals but also nationals of allied or



neutral States,<sup>20</sup> and that it can even assume jurisdiction over war crimes committed before its own entry into the war.<sup>21</sup> The corollary is that neutral States can equally prosecute belligerent war criminals.<sup>22</sup>

In the *Eichmann* trial, the Israel Supreme Court—which unequivocally endorsed the application of the universality principle to war crimes<sup>23</sup>—arrived at the conclusion that “no importance attaches to the fact that the State of Israel did not exist when the offenses [including war crimes] were committed.”<sup>24</sup> This position has been reinforced by the judgment of the United States Court of Appeals (Sixth Circuit) in the *Demjanjuk* case of 1985:

Further, the fact that the State of Israel was not in existence when Demjanjuk allegedly committed the offenses is no bar to Israel’s exercising jurisdiction under the universality principle. When proceeding on that jurisdictional premise, neither the nationality of the accused or the victim(s), nor the location of the crime is significant. The underlying assumption is that the crimes are offenses against the law of nations or against humanity and that the prosecuting nation is acting for all nations. This being so, Israel or any other nation, regardless of its status in 1942 or 1943, may undertake to vindicate the interest of all nations by seeking to punish the perpetrators of such crimes.<sup>25</sup>

The extension of the purview of jurisdiction over war crimes of all stripes is perfectly justifiable. The import of bringing the universality principle to bear upon war crimes is that all States without exception—rather than merely belligerent States—are possessed of the power to mete out justice to any war criminal and that they can ignore the geographic, temporal, or national dimensions of the offense.<sup>26</sup> While some scholars continue what may be called a rear-guard action against acceptance of the universality principle as appertaining to war crimes,<sup>27</sup> by now it must be abundantly clear that the issue has been settled in customary international law.<sup>28</sup> Patently, war crimes can be assimilated to piracy in the frame of reference of universality of jurisdiction.<sup>29</sup>

The four Geneva Conventions of 1949 for the Protection of War Victims include a common stipulation governing “grave breaches” of these instruments:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.<sup>30</sup>

In accordance with Article 85(5) of the 1977 Additional Protocol I to the Geneva Conventions, the grave breaches referred to (as well as those supplemented by the Protocol itself) “shall be regarded as war crimes.”<sup>31</sup>

In the opinion of the present writer, the text of the common clause of the Geneva Conventions constitutes a pellucid expression of the universality principle. True, this is not unanimously avowed. One eminent scholar argues, “The view that the 1949 Geneva Conventions provide for universal jurisdiction, though sometimes asserted, is probably incorrect.”<sup>32</sup> But surely, the correct interpretation of the Geneva text is the one offered by Hans-Heinrich Jeschek:

According to the Geneva Conventions of 1949, signatory States are not only empowered to punish war crimes, but also are obliged to do so, unless the accused is extradited to another signatory State (*aut dedere aut punire*). The duty to punish attaches not only to the States to which the accused owes his allegiance or to the injured State, but to all the signatory States; this duty even extends to neutrals in an armed conflict, and it exists without regard to the nationality of the perpetrator or victim or to the place where the crime took place. Hence the Geneva Conventions provide universal jurisdiction for the punishment of war crimes coupled with a duty to prosecute, since the goal is the protection of common and universal interests.<sup>33</sup>

It is sometimes contended that only more serious war crimes (like the grave breaches of the Geneva Conventions)—rather than war crimes of a technical nature—activate the universality principle.<sup>34</sup> But this is a misconception. The correct view is that technical violations of the laws of war simply do not constitute war crimes.<sup>35</sup> Once violations of the laws of war qualify as war crimes, all come under the sway of the universality principle.

In 1996, the International Law Commission defined War Crimes in Article 20 of its Draft Code of Crimes against the Peace and Security of Mankind.<sup>36</sup> Although, in part, the definition may give rise to debate,<sup>37</sup> it mostly consists of grave breaches of the Geneva Conventions and Protocol.<sup>38</sup> Article 8 of the Draft Code<sup>39</sup> “establishes the principle of the concurrent jurisdiction of the national courts of all States parties to the present Code based on the principle of universal jurisdiction” for crimes set out in Article 20.<sup>40</sup>

### III

The universality principle embraces solely offenses established and defined by international law, with a view to protecting the interests of the international



community in its entirety. It must not be confused with the protective principle, which applies to the national interests of individual States. Both principles admittedly lead to a similar outcome: States may assert criminal jurisdiction over foreigners acting extraterritorially. Nevertheless, the two principles proceed from radically different points of departure. One principle is designed to protect the single State against those trying to subvert its vital interests. That single State, which is the only one affected, is exclusively allowed to take action—no other State can invoke jurisdiction on its behalf (although any State may act on the ground of territoriality or active personality where appropriate). The second principle is equally protective, but it lends its aegis to the collectivity of States (the “family of nations”). “It is founded upon the accused’s attack upon the international order as a whole.”<sup>41</sup> All States are supposed to have a stake in suppressing *delicta juris gentium*, and all are simultaneously endowed with the authority to exercise criminal jurisdiction. Consequently, as a rule, there cannot be a genuine overlap between the universality principle and the protective principle. The present writer disagrees with the reliance on the protective principle—as an auxiliary base of extraterritorial jurisdiction, side by side with the universality principle—by the District Court of Jerusalem (with the approval of the Israel Supreme Court), in the context of genocide, in the *Eichmann* trial.<sup>42</sup> However, even if mass-scale genocide directed at the entire Jewish people can be exceptionally construed as impinging upon the vital interests of the State of Israel (albeit perpetrated before the birth of the State), thereby triggering the protective principle, only the universality principle is apposite to war crimes.

There is no similar disconnection between the universality principle, on the one hand, and the territoriality, active personality, or passive personality principles, on the other. Universality postulates the irrelevance of either territory or nationality (of the victim as well as the offender). Still, if the territorial State or the State of nationality—when actually asserting criminal jurisdiction—prefers to act as such without invoking the universality principle, nothing prevents it from doing so. International law enables any State to turn a blind eye to the territorial or national link once universality is vouchsafed, but there is no compulsion to do so. When a State prosecutes members of its own armed forces who have committed war crimes, it benefits from an incontrovertible advantage if it acts in the name of the active personality principle rather than the universality principle. The trial can then be predicated solely on the domestic military penal code and need not take into account the limitations imposed on the State when availing itself of the special powers emanating from the universality principle.<sup>43</sup> By contrast, if the State



wishes to prosecute enemy soldiers as war criminals, it has no alternative but to act within the framework of the universality principle (unless the victims are its own nationals or the crimes were committed on its territory).

#### IV

When the universality principle is applicable, the outcome is concurrent jurisdiction of all States. If all States acquire jurisdiction, all can exercise it. Evidently, "[c]oncurrent jurisdiction is no obstacle to the exercise of jurisdiction by any single-state."<sup>44</sup> Yet, when (as in the above-quoted text of the Geneva Conventions) the universality principle is couched in a binding language, amounting to a duty—rather than in a permissive manner simply creating a right—the potential competition engendered by the multiplicity of choices of forum must be addressed. Hence, the duty incurred under the Geneva Conventions and other instruments is generally represented in optional terms: either to render or to prosecute the accused.<sup>45</sup> Normally, the Latin formula is adduced: *aut dedere aut judicare*. The alleged offender can be rendered to another State (principally through the mechanism of extradition) for the exercise of foreign jurisdiction.<sup>46</sup> Still, when no such rendition takes place (because extradition is either not sought or denied, or for whatever other reason), there is a manifest duty to proceed with the exercise of local jurisdiction. The main thing is that one State or another will exercise its concurrent jurisdiction, so that an offender does not go scot-free.

All too often (perhaps especially where war crimes are concerned), there are problems with both alternatives, *judicare* and *dedere*. States may be reluctant or even unable to institute judicial proceedings themselves. In Theodor Meron's words:

Universal jurisdiction over war crimes means that all states have the right under international law to exercise criminal jurisdiction over the offenders. Most states do not have the necessary resources or interest to prosecute offenders when the state itself was not involved in the situation in question. Many states also do not have national laws in place that allow them to prosecute offenders.<sup>47</sup>

At the same time, extradition—if sought—is frequently frustrated for technical or other reasons.<sup>48</sup>

As against the all-too-familiar factual situation where no country is overeager to prosecute war criminals, it is necessary to pose the reverse state of affairs (however rare) wherein several countries vie to lay hands on the accused, each desirous of exercising in practice its respective (concurrent)

jurisdiction. The question is whether any particular State, by dint of being more closely linked to the case at hand, has a better claim and therefore priority.

No general rule regulating this matter has evolved in general international law. It is noteworthy, however, that no less than ten conventions pertaining to international criminal law have established a hierarchy formula in which a measure of priority is conferred on certain States (without negating the jurisdiction of others). The trail-blazing provision appears in Article 4 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, which reads:

1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence, in the following cases:

- (a) when the offence is committed on board an aircraft registered in that State;
- (b) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;
- (c) when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.

2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.<sup>49</sup>

What is the correct interpretation of Article 4?<sup>50</sup> In effect, the drafters of the Convention set forth that every State has a right (and indeed a duty) to exercise jurisdiction over the offense of aircraft hijacking. All the same, a double-tiered structure of jurisdiction is constructed. There are three preferred States with primary jurisdiction: the State of registration of the aircraft, the State where the aircraft lands with the offender still on board, and the State of the operator of the aircraft when it is on lease.<sup>51</sup> The expectation is that in the natural order of things, one of the three preferred States will be able and willing

to exercise jurisdiction over the offender. However, should this not come to pass owing to failure of extradition, whichever State has the hijacker in its hands is entitled and required to prosecute him, in keeping with the maxim *aut dedere aut judicare*.

The double-tiered structure of jurisdiction (with different lists of preferred States, as the subject matter dictates) is also adopted in the following conventions pertaining to international criminal law:

- Article 5 of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.<sup>52</sup> Here there are four preferred States: the State of territoriality plus the three States enumerated in the Hague Convention.

- Article 3 of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.<sup>53</sup> The three preferred States are the State of territoriality (explicitly including ships and aircraft registered therein), the State of nationality, and the State of passive personality (determined by virtue of function rather than strict nationality).

- Article 5 of the 1979 International Convention against the Taking of Hostages.<sup>54</sup> The four preferred States are the first two listed in the 1973 Convention (plus a discretionary jurisdiction over habitual residents who are stateless), the target State, and (where the State considers it appropriate) the passive personality State (based on the nationality of the victim).

- Article 8 of the 1980 Convention on the Physical Protection of Nuclear Material.<sup>55</sup> The two preferred States are the first two indicated in the 1973 Convention (without reference to stateless persons). There is also a specific reference in another paragraph to the State of export or import.

- Article 5 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>56</sup> The three preferred States are again the first two catalogued in the 1973 Convention (without provision for stateless persons), and the last of the 1979 Convention.

- Article 6 of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.<sup>57</sup> The three preferred States are the flag State of a ship, the State of territoriality, and the State of nationality. Three other States are on a lesser standing, but still preferred in relation to the rest: the State of stateless habitual residents, the State of passive personality (based on nationality), and the target State. The interests of the flag State in case of several requests for extradition are particularly accentuated in Article 11(5).<sup>58</sup> The priority claim of the flag State to exercise jurisdiction is still not absolute, but it should have greater weight.<sup>59</sup>



- Article 4 of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.<sup>60</sup> The two preferred States are the State of territoriality and the State of the vessel flying its flag or the aircraft registered in it. A lesser status is bestowed on the State of nationality or habitual residence (irrespective of statelessness) and two additional special cases.

- Article 9 of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries.<sup>61</sup> The two preferred States are the first two enumerated in the 1979 Convention.

- Article 10 of the 1994 Convention on the Safety of United Nations and Associated Personnel.<sup>62</sup> The two preferred States are the first two listed in the 1973 Convention. The 1988 Maritime Convention formula of three semi-preferred States is also repeated.

In all, notwithstanding inevitable variations in the multifarious instruments, the fundamental approach is the same. Whereas some preferred States are endowed with primary jurisdiction—with no mandatory priority—what emerges in the final analysis is universal jurisdiction.<sup>63</sup> It goes without saying that none of the conventions cited is germane to the issue of war crimes. Still, in future practice the nonbinding preference scheme may be looked upon with favor in that setting too. As for the choice of the States with a preferred status, judging by the trend highlighted in the conventions, it is probably safe to prognosticate that the three States to be generally deemed most closely connected to war crimes would be: the State of territoriality (including ships and aircraft registered therein), the State of active personality, and the State of passive personality.

## V

Concurrent jurisdiction of all States over war criminals—in consequence of the universality principle—means not only that the judicial authorities of each State separately can sit in judgment over alleged offenders, but that any combination of States can set up an international penal tribunal with a view to carrying out the same mission on a multinational level. Thus, in the 1945 London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (initially adopted by the four big powers—the United States, the USSR, the United Kingdom and France—and later acceded to by many other Allied nations), an International Military Tribunal was established.<sup>64</sup> Pursuant to Article 6 of the Tribunal's Charter, it had jurisdiction over war crimes as well as crimes against peace and humanity.<sup>65</sup>

Following a celebrated trial conducted at Nuremberg, the 1946 Judgment proclaimed that in creating the International Military Tribunal the Contracting Parties to the London Agreement had “done together what any one of them might have done singly.”<sup>66</sup> In other words, given the umbrella of the universality principle, either the United States or any other country could have prosecuted Nazi war criminals while acting alone. In joining forces, the Contracting Parties to the London Agreement merely pooled together their resources, avoided competition and conflict, and ensured that justice would be done.

This is also the best rationalization for the creation by the UN Security Council, in Resolution 827 (1993), of the International Criminal Tribunal for the Former Yugoslavia,<sup>67</sup> with subject-matter jurisdiction, *inter alia*, over grave breaches of the Geneva Conventions and violations of the laws and customs of war (Articles 2-3 of the Tribunal’s Statute).<sup>68</sup> The legitimacy of the establishment of the Tribunal by fiat of the Security Council has been called into question by some commentators against the background of the UN Charter.<sup>69</sup> The Appeals Chamber of the Tribunal rejected at some length a challenge to its jurisdiction on that score.<sup>70</sup> Without getting into this complex issue, which is beyond the scope of the present paper, it must be perceived that irrespective of the range of powers allocated in the UN Charter, the establishment by the Security Council of an international penal tribunal with jurisdiction over war crimes is sanctioned by the universality principle. The Member States of the United Nations have done together what each of them might have done singly. No doubt, universal jurisdiction “is not synonymous with centralised jurisdiction,” but the two are not mutually exclusive either.<sup>71</sup>

When an international penal tribunal is installed for the trial of war criminals, a problem that immediately comes to mind is whether the ordinary option of *aut dedere aut judicare* endures and whether the international tribunal has a status merely resembling that of an ordinary foreign court (with the same loose guidelines of preference in extradition discussed *supra*). Article 9 of the Statute of the Yugoslav Tribunal addresses the issue head on, and while confirming the concurrent jurisdiction of national courts, decrees that the Tribunal “shall have primacy over national courts” and that the Tribunal may formally request the latter to defer to its competence.<sup>72</sup>

The notion of primacy of an international tribunal over national courts was assailed by the defense in the *Tadić* case. The Appeals Chamber of the Yugoslav Tribunal held that when an international penal tribunal is created, “it must be endowed with primacy over national courts,” for otherwise stratagems may be used to defeat the purpose of diligently prosecuting international



offenders.<sup>73</sup> The Tribunal's explanation is conspicuously valid; indeed, perhaps the primacy concept should be construed within the ambit of that explanation. Intervention by an international penal tribunal in national proceedings (when a State wishes to exercise jurisdiction over a person in its custody) should not be undertaken unless there is reason to suspect that otherwise international justice is liable to be obstructed. In essence, this was also the opinion expressed by several Permanent Members of the Security Council in the course of its debates.<sup>74</sup>

This brings up a related issue. One of the most salient human rights recognized by contemporary international law is freedom from double jeopardy: no one can be retried for an offense for which he has already been finally convicted or acquitted by a competent court.<sup>75</sup> The pleas of *autrefois acquit* or *autrefois convict* are universally accepted as effectively barring further prosecution for the same offence.

Under Article 86 of Geneva Convention III, the principle of *non bis in idem* applies to prisoners of war, who may not "be punished more than once for the same act or on the same charge."<sup>76</sup> This provision, which covers the prosecution of war criminals, is applicable when double jeopardy is derived from the operation of judicial authorities in the territory of a single State. But what about transboundary retrials of war criminals (or other international offenders)? The matter seems to be unsettled in customary international law.<sup>77</sup> However, this writer believes that the concept of *non bis in idem* should apply in principle to attempts by courts of several States to prosecute the same person for the same offense—while invoking the universality principle—no less than it does to parallel attempts by courts of an individual State. There is in fact doctrinal support for the position that a State ought to have no criminal jurisdiction over persons who have already been prosecuted elsewhere for the same offense.<sup>78</sup>

A vexing issue arises, however, in the singular context of concurrent jurisdiction over war crimes (and other international offenses). There may be a disquieting apprehension that the judicial authorities of a particular State who view the acts of the alleged offender with leniency (owing to ethnic, political, ideological or religious motivations) would go through the motions of a sham trial and either acquit him or impose on him—after conviction—a nominal sentence, thereby thwarting the administration of justice. If justice is to be done (and especially appear to be done), this apprehension must be dispelled.

Article 10 of the Yugoslav Statute handles this matter with finesse.<sup>79</sup> In paragraph 1 it pronounces that no person shall be tried before a national court



for criminal acts for which he has already been tried by the International Tribunal. Paragraph 2 provides:

2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:

- (a) the act for which he or she was tried was characterized as an ordinary crime; or
- (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

Paragraph 3 adds that in imposing a penalty the International Tribunal shall take into account any sentence served by a convicted person as a result of an earlier national trial.

Attention should be drawn to the fact that apart from the scenario of spurious or biased national proceedings, the text of the Yugoslav Tribunal's Statute also permits retrial if the original prosecution related to ordinary crimes. This is quite sensible. As indicated by the International Law Commission, should an individual be tried by a national court for a "lesser crime" (that is, national rather than international), the prior decision of that court should not immunize him from subsequent international proceedings expected to "encompass the full extent of his criminal conduct."<sup>80</sup>

The *non bis in idem* formula—used in the Yugoslav Tribunal's Statute—was replicated in the 1994 Statute of the International Tribunal for Rwanda;<sup>81</sup> it was followed by the International Law Commission (the same year) in Article 42 of the Draft Statute for an International Criminal Court.<sup>82</sup> However, the formula does not come to grips with the prospect of a trial by a national court of State A subsequent to a trial for the same offense by a national court of State B. The International Law Commission, in Article 12 of its 1996 Draft Code of Crimes against the Peace and Security of Mankind, after reiterating the same formula in regard to international proceedings, goes on to specify that retrial by a national court of another State is allowed if that other State is the territorial State or was the main victim of the crime.<sup>83</sup> This is a most unsatisfactory solution to the dilemma, applying as it does even in the absence of any claim that the previous proceedings entailed a travesty of justice or that they were other than impartial. This writer is convinced that the same formula ought to

apply to retrial by the national courts of another State as by an international tribunal.

## VI

There are three dimensions to the criminal jurisdiction of States under international law: jurisdiction to prescribe (i.e., to legislate), jurisdiction to adjudicate (i.e., to put on trial), and jurisdiction to enforce (i.e., to punish).<sup>84</sup> The need to distinguish between the three facets of jurisdiction becomes prominent when the principle of universality is invoked, as in the case of war crimes.

**Jurisdiction to Prescribe.** *Ex hypothesi*, once the universality principle applies, no State is vested with jurisdiction to prescribe in the full sense of the term. The major premise underlying the universality principle is that the forbidden acts are *delicta juris gentium*, meaning that they have been criminalized by international law. The State “must ensure that its legislation does not extend the definition of the offense beyond the limits of international law.”<sup>85</sup> It must be fully appreciated that only acts branded as war crimes by international law are subject to universal jurisdiction. Therefore, the domestic legal system is not free to add its own versions of putative war crimes to the list prescribed (and proscribed) by international law. Should the domestic legal system label as “war crimes” acts not deemed war crimes by international law, the universality principle would not be in effect. Only war crimes *juris gentium* can sustain a claim to universal jurisdiction.

Jurisdiction to prescribe in the context of the universality principle has to be understood in a different sense. Every State has a right—and indeed a duty—to enact any enabling legislation required to lay the foundation for the domestic prosecution and punishment of international offenders. Such enabling legislation is ordained by each of the four Geneva Conventions of 1949: “The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.”<sup>86</sup>

**Jurisdiction to Adjudicate.** Jurisdiction to adjudicate in criminal matters means the prosecution and trial of offenders. Traditionally, jurisdiction to adjudicate has been treated as “ancillary to jurisdiction to prescribe.”<sup>87</sup> However, in the case of the universality principle, every State is vested with jurisdiction to

adjudicate notwithstanding the absence of jurisdiction to prescribe in the full sense of the term.

When a State exercises its universal criminal jurisdiction to adjudicate by sitting in trial over war criminals, it must of course comply with all the standards of due process of law, as demanded by international law.<sup>88</sup> The duty devolving on a State in the absence of *dedere* is consequently only one of *judicare* rather than *punire*. It is entirely possible that indictment of an alleged offender will end in acquittal.

The prosecutorial authorities in the State wherein the alleged offender happens to be present must have discretion in assessing the case at hand: much depends on where the witnesses and the rest of the evidence are. It is important not to prosecute hastily, lest there be acquittal and the principle *non bis in idem* apply. To be sure, the alleged offender may benefit from a potential gap in the system if the prosecutorial authorities in the State where he is present lack enough evidence to indict, yet another State (which does have enough evidence) fails to request extradition. Such a turn of events, characterized by neither *dedere* nor *judicare*, would produce a fiasco.

Can a State exercise criminal jurisdiction over war criminals *in absentia*? “[L]iterally hundreds of war crimes cases” were tried in France and Belgium after both world wars in the absence of the accused.<sup>89</sup> Article 12 of the Charter of the International Military Tribunal (sitting at Nuremberg) expressly allowed the Tribunal to take proceedings against a person in his absence.<sup>90</sup> Bormann, who was not in custody, was indicted accordingly, and the Tribunal issued a special Order making it possible to go on with his trial;<sup>91</sup> ultimately Bormann was convicted and sentenced to death.<sup>92</sup> A fictitious assertion of criminal jurisdiction over war crimes is apparently permissible. However, since Bormann has never been caught, his sentence only exposed the futility of *in absentia* proceedings. It is not clear what advantages are to be gained from such an academic exercise if the accused is not within grasp. In any event, the Nuremberg precedent was not followed in the case of the Yugoslav Tribunal, which does not possess jurisdiction to try persons *in absentia*.<sup>93</sup>

**Jurisdiction to Enforce.** Jurisdiction to enforce in the domain of war crimes means, primarily, punishment of persons convicted and sentenced by a competent court. Usually, trials of war criminals are held and sentences served within the boundaries of the same country. Yet, by agreement a State may keep in its prison facilities offenders convicted and sentenced by an international tribunal,<sup>94</sup> or even by a national court of a foreign country.<sup>95</sup>



Jurisdiction to enforce also relates to preventive and other coercive measures taken by a State with a view to the suppression of war crimes. Under the universality principle, every State is empowered to take these steps against international offenders. However, the empowerment is embedded in the assumption that the State is acting within its territory (including vessels and aircraft registered therein) or on the high seas. The universality principle does not authorize a State to take coercive action within the territory of another State without the latter's consent. Differently put, the police of one State are not allowed to enter the territory of another (absent consent) in order to arrest an individual, "not even to enforce law that is subject to universal jurisdiction."<sup>96</sup>

It is true that in egregious circumstances there have been occasions in which enforcement measures were carried out within the territory of another State without its consent. The abduction of Eichmann from Argentina for trial in Israel is a leading example. But it must be borne in mind that the crimes he perpetrated were staggering and that in realistic terms abduction "was the only means of obtaining physical jurisdiction over" him.<sup>97</sup> Security Council Resolution 138 (1960), which resolved the dispute over the abduction—and which declared (quite disingenuously) that "if repeated," the acts affecting the sovereignty of a Member State may endanger international peace and security—did not fail to note "the concern of people in all countries that Eichmann should be brought to appropriate justice for the crimes of which he is accused."<sup>98</sup> The Eichmann precedent must be considered overall as a rare exception rather than the rule: the rule of enforcement is and remains based on respect for the sovereignty of foreign States.

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### Notes

1. See 1(1) OPPENHEIM, INTERNATIONAL LAW 456 (Jennings & Watts eds., 9th ed. 1992).

2. As the Permanent Court of International Justice stated, "this might be the outcome of the close connection which for a long time existed between the conception of supreme criminal jurisdiction and that of the state, and also by the especial importance of criminal jurisdiction from the point of view of the individual." S.S. *Lotus* (1927), 2 WORLD COURT REPORTS 36 (Hudson ed., 1935).

3. The effects doctrine dominated the opinion of the majority of the Court in the *Lotus Case*, *id.* at 38–39.

4. See, e.g., the dissenting opinion of Judge John Bassett Moore in the *Lotus Case*, *id.* at 82.

5. See, e.g., Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, art. 4(b), 20 U.S.T. 2941, T.I.A.S. No. 6763, 704 U.N.T.S. 219, 2 I.L.M. 1042, 1963 U.N. JURID. Y.B. 136, 137.

6. For a full discussion, see Dinstein, *The Extra-Territorial Jurisdiction of States: The Protective Principle*, 65(2) ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 305–315 (1993).
7. Schachter, *International Law in Theory and Practice. General Course in Public International Law*, 178 RECUEIL DES COURS 9, 262 (1982).
8. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 304 (4th ed. 1990) (for quotation).
9. Gilbert, *Crimes Sans Frontières: Jurisdictional Problems in English Law*, 63 BRIT. Y.B. INT'L L. 415, 424 (1992).
10. See THE AMERICAN LAW INSTITUTE, 1 RESTATEMENT OF THE LAW, THE FOREIGN RELATIONS LAW OF THE UNITED STATES 257, §401 (3rd ed. 1987) [hereinafter RESTATEMENT].
11. Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the U.N. General Assembly on Dec. 9, 1948, 78 U.N.T.S. 277, reprinted in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 231, 232–233 (Schindler & Toman eds., 3d ed. 1988).
12. See Schachter, *supra* note 7, at 262.
13. United Nations Convention on the Law of the Sea, 1982, Official Text 34 (1983), U.N. Doc. A/CONF.62/122.
14. See DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW*, bk. III, ch. VIII, §141; vol. 3, p. 280 (Fenwick trans., Classics of International Law ed., 1993).
15. See 2 OPPENHEIM, *INTERNATIONAL LAW* 309–310 (2d ed. 1912).
16. See, e.g., Cowles, *Universality of Jurisdiction over War Crimes*, 33 CAL. L. REV. 177, 218 (1945).
17. See Dinstein, *Crimes against Humanity*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY, ESSAYS IN HONOUR OF K. SKUBISZEWSKI* 891–908 (Makarczyk ed., 1996).
18. See, e.g., Hostages Case (U.S. v. List et al.), 11 T.W.C. 1230, 1241 (U.S. Mil. Trib., 1948).
19. See Brand, *The War Crimes Trials and the Laws of War*, 26 BRIT. Y.B. INT'L L. 414, 414 (1949).
20. See MCDUGAL & FELICIANO, *THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER* 716–717 (1994).
21. See Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145, 160 n. 4 (1972–1973).
22. See Baxter, *The Municipal and International Law Basis of Jurisdiction over War Crimes*, 28 BRIT. Y.B. INT'L L. 382, 392 (1951).
23. Attorney-General v. Eichmann, 36 I.L.R. 277, 300–302 (Isr. S. Ct., 1962). See also Green, *The Maxim Nullum Crimen Sine Lege and the Eichmann Trial*, 38 BRIT. Y.B. INT'L L. 457 (1962).
24. *Id.* at 304.
25. Demjanjuk v. Petrovsky, 776 F.2d 571, 582–583 (6th Cir. 1985).
26. See MCDUGAL & FELICIANO, *supra* note 20, at 718.
27. See, e.g., Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources*, 53 BRIT. Y.B. INT'L L. 1, 12 (1982).
28. See Randall, *Universal Jurisdiction under International Law*, 66 TEX. L. REV. 785, 800–815 (1988).



29. Even those maintaining that universal jurisdiction is not as widespread as suggested in this paper do not challenge its current attachment to war crimes. Some scholars sum up the position as follows: "There are probably today only two clear-cut cases of universal jurisdiction, namely the crime of piracy *jure gentium*, and war crimes." STARKE, *INTERNATIONAL LAW* 212 (Shearer ed., 11th ed. 1994).

30. Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, art. 49 (second para.), 75 U.N.T.S. 31, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 11, at 373, 391; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, art. 50 (second para.), 75 U.N.T.S. 85, *reprinted in id.* at 401, 418; Geneva Convention III Relative to the Treatment of Prisoners of War, 1949, art. 129 (second para.), 75 U.N.T.S. 135 *reprinted in id.* at 423, 476; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 1949, art. 146 (second para.), 75 U.N.T.S. 287, *reprinted in id.* at 495, 547.

31. Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, 76 I.L.M. 1391 (1977), *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 11, at 621, 672.

32. Bowett, *supra* note 27, at 12.

33. Jeschek, *War Crimes*, 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 294, 297 (Bernhardt ed., 1982).

34. See Carnegie, *Jurisdiction over Violations of the Law and Customs of War*, 39 *BRIT. Y.B. INT'L L.* 402, 423 (1963).

35. See Dinstein, *The Distinctions between War Crimes and Crimes against Peace*, in *WAR CRIMES IN INTERNATIONAL LAW* 1, 3-4 (Dinstein & Tabory eds., 1996).

36. Report of the International Law Commission, 48th Session (1996), 110-112 (U.N. Doc. A/51/10, mimeographed) (Text).

37. See Rosenstock, *The Forty-Eighth Session of the International Law Commission*, 91 *AM. J. INT'L L.* 365, 370 (1997).

38. See Report of the International Law Commission, 48th Session, *supra* note 36, at 114-115 (Commentary).

39. *Id.* at 42 (Text).

40. *Id.* at 45 (Commentary).

41. Mann, *The Doctrine of Jurisdiction in International Law*, 111 *RECUEIL DES COURS* 9, 95 (1964).

42. *Attorney-General v. Eichmann*, *supra* note 23, at 18, 54 (D. Ct., 1961), 304 (S. Ct.).

43. Thus, charges by U.S. authorities against American personnel relating to the commission of war crimes in Vietnam "were actually brought not on the basis of international law but of the law of the United States and the Uniform Code of Military Justice." Green, *War Crimes, Crimes against Humanity, and Command Responsibility*, *NAVAL WAR C. REV.*, Spring 1997, at 26, 40.

44. Shachor-Landau, *Extraterritorial Penal Jurisdiction and Extradition*, 29 *INT'L & COMP. L.Q.* 274, 285 (1980).

45. The option "either to surrender or to punish" a culprit first appears in GROTIUS, *DE JURE BELLI AC PACIS*, bk. II, ch. XXI, §IV; translation, vol. 2, at 528 (Kelsey trans., *Classics of International Law* ed., 1984).

46. On the distinctions between extradition and other procedures (deportation and exclusion), see SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 76-93 (1971).

47. Meron, *International Criminalization of Internal Atrocities*, 89 *AM. J. INT'L L.* 554, 573-574 (1995).



48. See van den Wyngaert, *The Suppression of War Crimes under Additional Protocol I*, in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD, ESSAYS IN HONOUR OF F. KALSHOVEN 197, 204–205 (Delissen & Tanja eds., 1991).
49. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 10 I.L.M. 133 (1971), 1970 U.N. JURID. Y.B. 131.
50. For a full treatment of the subject, see Dinstein, *Criminal Jurisdiction over Aircraft Hijacking*, 7 ISR. L. REV. 195–206 (1972).
51. The choice of the three preferred States is debatable. See *id.* at 203–204.
52. Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 10 I.L.M. 1151 (1971), 1971 U.N. JURID. Y.B. 143, 145.
53. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the U.N. General Assembly, Dec. 14, 1973, T.I.A.S. No. 8532, 13 I.L.M. 41 (1977), 1973 U.N. JURID. Y.B. 75, 76.
54. International Convention against the Taking of Hostages, adopted by the U.N. General Assembly, Dec. 17, 1979, 18 I.L.M. 1456 (1979), 1979 U.N. JURID. Y.B. 124, 125.
55. Convention on the Physical Protection of Nuclear Material, 1980, *reprinted in* INTERNATIONAL CRIMINAL LAW, A COLLECTION OF INTERNATIONAL AND EUROPEAN INSTRUMENTS 55, 57–58 (van den Wyngaert & Stessens eds., 1996).
56. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the U.N. General Assembly, Dec. 10, 1984, 24 I.L.M. 535 (1985), 1984 U.N. JURID. Y.B. 135, 136.
57. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, 27 I.L.M. 672, 675–676 (1988).
58. *Id.* at 679.
59. See Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L L. 269, 302–303 (1988) (on the priority claim of the flag State).
60. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, 28 I.L.M. 497, 503–504 (1989).
61. International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 1989, 29 I.L.M. 91, 94 (1990).
62. Convention on the Safety of United Nations and Associated Personnel, 1994, 34 I.L.M. 485, 488–489 (1995).
63. See LAMBERT, *TERRORISM AND HOSTAGES IN INTERNATIONAL LAW—A COMMENTARY ON THE HOSTAGES CONVENTION* 140–165 (1990).
64. London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 1945, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 11, at 911, 912.
65. *Id.* at 913, 914.
66. Judgment, 1 T.M.W.C. 171, 218 (Int'l Mil. Trib., 1946).
67. S.C. Res. 827 (1993), 32 I.L.M. 1203, 1204 (1993).
68. Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (1993), *id.* at 1159, 1171–1172.
69. See, e.g., Arangio-Ruiz, *The Establishment of the International Criminal Tribunal for the Former Territory of Yugoslavia and the Doctrine of Implied Powers of the United Nations*, in DAI TRIBUNALI PENALI INTERNAZIONALI AD HOC A UNA CORTE PERMANENTE 31–45 (1996).

70. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, Appeals Chamber, *The Prosecutor v. Tadić*, Jurisdiction (Oct. 2, 1995) 8 (IT-94-1-AR72), 35 I.L.M. 32, 41–45 (1996).
71. See Fox, *The Objection to Transfer of Criminal Jurisdiction to the UN Tribunal*, 46 INT'L & COMP. L.Q. 434, 437 (1997) (for quotation).
72. Secretary-General's Report, *supra* note 68, at 1177.
73. *The Prosecutor v. Tadić*, *supra* note 70, at 52.
74. Shraga & Zacklin, *The International Criminal Tribunal for the Former Yugoslavia*, 5 EURO. J. INT'L L. 360, 371–372 (1994).
75. See Article 14(7) of the 1966 International Covenant on Civil and Political Rights, adopted by the U.N. General Assembly, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967), 1966 U.N. JURID. Y.B. 178, 183. As observed by the Trial Chamber of the Yugoslav Tribunal in the *Tadić* case, "this provision is generally applied so as to cover only a double prosecution within the same State." International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, Trial Chamber, *The Prosecutor v. Tadić*, Decision on the Defence Motion on the Principle of *non bis in idem* (Nov. 14, 1995) 8 (IT-94-1-T, mimeographed).
76. Geneva Convention III, *supra* note 30, at 460.
77. See Paust, *It's No Defense: Nullum Crimen, International Crime and the Gingerbread Man*, 60 ALB. L. REV. 657, 662 (1997).
78. See Boss, *The Extraterritorial Jurisdiction of States*, Revised Draft Resolution, Article 8(6), 65(1) ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 148, 151 (1993).
79. Secretary-General's Report, *supra* note 68, at 1177.
80. Report of the International Law Commission, 48th Session, *supra* note 36, at 69.
81. The provisions of Articles 9 (concurrent jurisdiction) and 10 (*non bis in idem*) of the Yugoslav Tribunal's Statute are replicated in Articles 8 and 9 of the Statute of the International Tribunal for Rwanda, established by the Security Council in Resolution 955 (1994), 33 I.L.M. 1600, 1605–1606 (1994). The latter Statute does not deal, however, with war crimes.
82. Report of the International Law Commission, 46th Session, (1994) II(2) Y.B.I.L.C. 1, 57.
83. Report of the International Law Commission, 48th Session, *supra* note 36, at 66.
84. For the three categories of jurisdiction, see 1 RESTATEMENT, *supra* note 10, at 232 (§401).
85. Green, *The German Federal Republic and the Exercise of Criminal Jurisdiction*, 43 U. TORONTO L.J. 207, 212 (1993).
86. Geneva Convention I, art. 49 (first para.); Geneva Convention II, art. 50 (first para.); Geneva Convention III, art. 129 (first para.); Geneva Convention IV, art. 146 (first para.), *supra* note 30, at 391, 418, 475–476 & 546–547.
87. 1 RESTATEMENT, *supra* note 10, at 304.
88. Essential rules pertaining to judicial proceedings against persons charged with war crimes are incorporated in Article 99 of Geneva Convention III, *supra* note 30, at 463–464. For the application of these rules to prisoners of war accused of war crimes, see COMMENTARY, III GENEVA CONVENTION 415–416 (de Preux ed., 1960).
89. See LEVIE, *TERRORISM IN WAR—THE LAW OF WAR CRIMES* 35, 433 (1993).
90. London Agreement, *supra* note 64, at 915.
91. Order of the Tribunal regarding Notice to Defendant Bormann, 1 T.M.W.C. 102, 102 (Int'l Mil. Trib., 1945).
92. International Military Tribunal, Judgment, *supra* note 66, at 340–341, 367.

93. See Guillaume, *The Future of International Judicial Institutions*, 44 INT'L & COMP. L.Q. 848, 857 (1995).

94. See Article 27 of the Statute of the Yugoslav Tribunal, Secretary-General's Report, *supra* note 68, at 1188.

95. If a trial for war crimes is conducted by a Detaining Power holding a prisoner of war, his transfer to another Power will additionally be governed by Article 12 of Geneva Convention III, *supra* note 30, at 434-435.

96. Henkin, *International Law: Politics, Values and Functions*. General Course on Public International Law, 216 RECUEIL DES COURS 9, 313 (1989).

97. Silving, *In re Eichmann: A Dilemma of Law and Morality*, 55 AM. J. INT'L L. 307, 338 (1961).

98. S.C. Res. 138 (1960), 4 UNITED NATIONS RESOLUTIONS, SERIES II: RESOLUTIONS AND DECISIONS OF THE SECURITY COUNCIL 14, 14 (Djonovich ed., 1989).





# III

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## Implementation of International Humanitarian Law in Future Wars

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Louise Doswald-Beck

ANY ATTEMPT TO LOOK INTO THE FUTURE is fraught with difficulty and the likelihood that much of it will be wrong. If someone in 1898 had tried to foresee issues relating to the implementation of the laws and customs of war in the twentieth century, it is highly unlikely that he could have foreseen many of the major developments that have characterized warfare in this century and, therefore, the difficulties of implementation that these created. At best, he could have based his attempt on trends, in particular the development of mechanization at that time. Putting aside the possibility of dramatic events like a catastrophic nuclear war, or unforeseeable fundamental changes in the nature of warfare or the organization of international society, the most one can hope to do is to extrapolate from present trends and see how these could affect the implementation of the law in the future. In so doing, one may assume that human nature will not change, although the organization of society and of international relations could well do so.

Implementation of international humanitarian law can take place on three levels, namely, by the individual undertaking an act during an armed conflict, by the society for which he is acting, and finally by the efforts of the international community. Generally speaking, laws that reflect the values of a

society, or at least the interests of those in a position to enforce the law, have a good chance of being implemented.

This article will attempt to analyze the factors that help or hinder the implementation of the law. It will first examine those factors that helped such law develop in customary practices, and analyze whether they continue to be present this century and what the prospects might be for the future based on present trends. The changes in international society that appear to be taking place and the effect these may have on implementation will then be considered. Finally, the article will consider certain mechanisms for implementation. With respect to implementation, this author does not assume that we should speak of implementation of the law in the next century as the law stands now, but assumes that changes and developments will take place in order to reflect developments in technology, methods of warfare, and society. This article will therefore consider implementation of the major principles of international humanitarian law that reflect its basic purpose as we understand it today, namely, the limitation of means and methods of warfare and the regulation of the treatment of persons in the power of adverse authorities in order to limit the destructiveness and suffering of war.

### **Factors That Helped Ensure the Implementation of the “Laws and Customs of War”**

First, if rules reflect existing general practice, it is likely that their implementation will not be particularly difficult, as efforts will probably be limited to keeping in line the occasional individual who behaves differently from others in his society.<sup>1</sup> It is noteworthy that prior to the attempts to codify the law in the late nineteenth century, the laws and customs of war were an articulation of the methods of warfare common to professional armies of that time. Nonprofessional groups were not expected to conform to this law and were, therefore, also not entitled to the privileges that were enjoyed by professional armies, especially prisoner-of-war status. The protection of the civilian population was assured largely by methods of combat rather than any strict rule to that effect. The lack of such a strict rule is illustrated by the fact that civilians did suffer greatly during sieges; they could even be forced back into the besieged city if they tried to escape.<sup>2</sup> On the other hand, the practice in the Middle Ages whereby a city's population could be punished for resisting capture was considered dishonorable and uncivilized by the eighth century.<sup>3</sup>



This brings us to the second factor of importance, namely, the belief by combatants of the appropriateness of having certain rules in battle. Not only did concepts of honor prevent the sacking of cities after capture, but they also imposed a number of rules relating to the treatment of other combatants. Most important were the prohibitions on the use of poison, treachery, and attacking an enemy combatant once *hors de combat*.<sup>4</sup> These values and the sense of responsibility that they entailed were clearly instilled not only by the societies in which professional soldiers were brought up but also by the ethic of the armies themselves. The criminality of violations of the law flowed fairly naturally from this sense of appropriate and inappropriate behavior.

The extent to which reciprocity was important in the context of this ethic is uncertain, for one must be careful not simply to project onto society of that age the concept as perceived today. There is no conclusive evidence that “civilized” societies, as they saw themselves, strictly required reciprocity for every action vis-à-vis each other.<sup>5</sup> However, as far as behavior in relation to “uncivilized” societies was concerned, it was conditioned by their incapacity, as it seemed at the time, to apply or appreciate such niceties. Evidence of this is to be found in the Lieber Code<sup>6</sup> and in the arguments of the British when they wanted to introduce the use of dum-dum (hollow-point) bullets.<sup>7</sup> However, another type of reciprocity did become important with the introduction of new rules in treaties, namely, the international law rule that parties need to be bound by the treaties in question. This was particularly evident in the general participation clause of the Hague Conventions.<sup>8</sup>

A third factor which fosters implementation is ease in applying the law. As the law followed practice in the last century, not being able to apply the law was simply not a problem for professional armies. Any potential difficulty was met by allowing exceptions where considered expedient. The most obvious example of this was the rule that captured soldiers were not to be attacked; exceptions were made if keeping them as prisoners of war was impossible for the commander concerned.<sup>9</sup>

Fourthly, a lack of hatred for the enemy or of desire for personal vengeance clearly helps prevent atrocities of all kinds. The fact that recourse to war was not illegal, or even unusual, in the past helped armies view each other as fellow professionals doing their job. The notorious cruelty of non-international armed conflicts is at least partly caused by the emotions involved, the other important aspect being the frequent involvement of nonprofessional combatants.

Finally, mental healthiness among combatants helps prevent atrocities. Although many may argue that only a deranged person would want to go into battle, there can be no doubt that the short battles of the past and the sense of

group cohesion in professional armies helped foster respect for the rules. On the other hand, prolonged and excessive stress has a very adverse effect on a soldier's capacity to abide by rules that require abstention from attack when he feels threatened.

### **Factors That Help Or Hinder the Implementation of the Law: Twentieth Century Difficulties and Future Prospects**

*Law and Methods of Warfare.* The single most important factor in creating problems regarding the implementation of the law in the twentieth century was clearly the dramatic changes in the technology of warfare. This may well continue to be a problem in the twenty-first century. Whereas war-making methods in the nineteenth century were not dramatically different from those of previous centuries, thus allowing the gradual development of customs which reflected such practice, the sudden and major changes of the twentieth century plunged the world into disarray and resulted in the need for extensive changes in the law by treaty.

*From Law Reflecting Practice to Law Preventing Practice.* The major motivation of the call by the czar of Russia for the conferences at the end of the nineteenth century and the beginning of the twentieth was the development of weaponry that he perceived was taking place. This was farsighted, for the extreme destructiveness of new technology was such that responsible politicians simply could not continue to let law reflect practice, which would have allowed whatever technology was capable of. However, this has meant that the law has increasingly been dictated by the need to curtail practice rather than reflect it, thereby creating tensions in relation to the implementation of the law in the twentieth century. Changes in the law largely prohibited certain new practices, such as the use of chemical weapons and massive bombardments of cities, although those who indulged in such practices were of the opinion that they had military utility. Other practices continued to be allowed despite some attempts to outlaw them; they have been responsible for a great deal of destruction and suffering. Examples include the use of submarines, bombardment by aircraft, mines, and long-range missiles. These inconsistencies have meant that the ethics of the law of war have become quite unclear to both normal soldiers and laymen.

The law no longer takes the simple approach that all militarily useless cruelty is prohibited, with the rest in principle allowed; the sheer destructive nature of today's technical possibilities means that compromises have had to be made for the sake of the survival of humanity. However, these compromises do



not always appear very consistent to the average person. The fact that certain bullets are prohibited but nuclear weapons have not been clearly and unambiguously prohibited creates scepticism regarding the seriousness of any of the law of war. The principle of proportionality in attack is an excellent example of compromise between military and humanitarian needs, but the implementation of this rule is somewhat subjective and unclear, and causes a certain degree of doubtfulness among those who hear it for the first time. The problem has been exacerbated by collateral damage that tends to occur after the event, such as water shortages or other highly negative effects of attacks on the power stations on which modern civilian society depends for survival.<sup>10</sup> The difficulty that civilians have in practice in obtaining protection from the effects of hostilities has had the effect of creating questions as to the continued need for law to protect combatants from excessively cruel weapons.<sup>11</sup>

*Potential New Weapons and the Need that Practice Again Reflect Law.* The perceived incongruity between practice and law that has developed this century has created a serious image problem for international humanitarian law. Law has to reflect practice at least to some degree in order to be taken seriously. For the reasons indicated above, it was not possible simply to have the law allow the use of any new technological possibility. Therefore, what is needed is a means to make practice reflect the law, or at least the basic principles of the law; in so doing practice can again reflect certain values rather than having primarily to stop practice. This is particularly important as there is evidence that we are, at the end of the twentieth century, on the brink of a major change in war-making capability that could be at least as important as the major changes that took place earlier in the twentieth century relative to the nineteenth. The extent of research that is taking place to develop directed-energy weapons means that we could see a major change in methods of warfare. At present, it is difficult to imagine the full impact of this change.<sup>12</sup> The ability of high-power microwaves and electromagnetic-pulse weapons to incapacitate electronics has enormous potential for the destruction of the life-support systems of technologically developed societies, which use such electronics for all kinds of purposes. The potential effect of acoustic beams and electromagnetic waves on persons is as yet not fully certain, nor is the extent to which they could be weaponized for antipersonnel purposes. Antimateriel laser beams are still being worked on, and one should not rule out the possibility of the development of antipersonnel lasers that target persons in different ways from the blinding laser weapons that have been recently banned.<sup>13</sup> Although the virtually instantaneous effect of these weapons, as well as their invisibility and silence, is bound to change methods of warfare in a major way, it would



require a military analyst with some imagination and foresight to indicate precisely how.

Other high-tech developments could be space-based weapons and various types of nuclear weapons. The so-called “star wars” antimissile systems ran into technical, as well as legal, difficulties, but it is not beyond possibility that these could be developed during the next century to hit targets within the atmosphere; currently, it is prohibited only to deploy nuclear weapons in space. With regard to possible further developments in nuclear weapons, the Comprehensive Test Ban Treaty should in theory prevent further development, but there are indications that this is not the case in practice. Abstention in use is largely due to their radiation effects; therefore, any developments that could substantially reduce or even eliminate these effects could tempt some to make use of their enormous blast capabilities.<sup>14</sup>

Mention must be made of a potential new method of warfare that is already prohibited in law but that could have horrific effects if developed, namely, genetic weapons. The specter of this as well as of new and obviously preliminary developments in bio-technology has already motivated States to begin negotiations for the development of verification methods for the Biological Weapons Convention.<sup>15</sup>

Compared with these potential developments, present work on so-called “non-lethal” weapons seems minor in comparison. However, care must nevertheless be taken to evaluate their potential impact, because any that could cause permanent disability would certainly not be more desirable from a humanitarian point of view than normal conventional weapons, and it is not even clear that all are necessarily non-lethal. Potential effects on the environment should also be considered.<sup>16</sup>

This author does not suggest that there should be a stop to weapons development. Not only would such a proposal be totally unrealistic, but some new characteristics, such as increased accuracy or ways to render targets *hors de combat* while minimizing damaging effects, could be positive developments. However, it does mean that if we are to preserve certain values for the sake of the survival of some notions of humanity, then those in a position to direct weapons research and development requirements need to take their responsibilities seriously. Therefore, it is important that in designing new weapons the values of the laws of war be taken into account at the outset to ensure not only that weapons are capable of distinguishing between civilians and combatants but also that antipersonnel weapons cause neither inevitable death nor permanent incapacity. Another factor of importance is the increasingly fragile environmental state of our planet. This is not something

that weapons developers had to think much about in the past, but for the sake of the survival of all of us it is earnestly hoped that this factor will be taken seriously in any new design of weapons. Given that much new weapons research these days is undertaken by companies which seek primarily to sell their products, it is important that States undertake to inform them beforehand of effects which are contrary to the rules or principles of international humanitarian law.

***Belief in the Appropriateness of the Rules.*** Belief in the appropriateness of humanitarian rules is the single most important factor for effective implementation of the law. As already indicated, it has been dealt a severe blow in the twentieth century by the inappropriateness of law primarily preventing practice rather than reflecting it. It is clear that law will need to be developed in order to address new methods of warfare. Some of such developments in the past have usefully helped reflect professional military utility; for example, the creation towards the beginning of this century of the notion of the military objective, arising from a new ability to bombard targets from a distance, helped reflect the military concept of economy of force.

*The crisis of the twentieth century.* The extensive effects of modern warfare and the practice of conscription in the twentieth century has meant that war making is no longer within the province of a few professionals. The fact that war is no longer a lawful means of settling disputes may have also contributed to a reduction in the professional respect between soldiers on opposing sides. More seriously, basic notions of "honor" effectively died this century, frequently leaving in their stead a certain cynicism toward, disbelief of, or plain ignorance about the fact that warfare is meant to have rules. The international community has tried to counter the increased destruction and cruelty of warfare in the twentieth century by more extensive and detailed treaty law. However, the fact that this law is for the most part not known, or where it is known, not sincerely believed in, has led to serious difficulty in getting most of it applied.

Some aspects of the law require interpretation by States, for example, the basic principles prohibiting weapons that are by nature indiscriminate or cause superfluous injury or unnecessary suffering. A lack of genuine belief in the importance of these rules renders ignoring them easy, and, generally speaking, States have not been willing to declare specific weapons illegal on the basis of these rules.<sup>17</sup> Instead, treaty prohibitions or a demise of use in practice have tended to result from the enormous pressure of public opinion.<sup>18</sup> Other rules are straightforward and detailed, in particular those in the 1949 Geneva



Conventions, which require certain respectful treatment of persons in the power of an adverse party. It would be possible to apply most of these rules without much difficulty if combatants and States genuinely believed in the importance of them. However, a number of factors have prevented this, including ignorance, hatred of the enemy, indifference, and competing interests. It is clear that if soldiers are to abide by the rules, they must be convinced that their commanders take such rules seriously and that to ignore prescribed behavior will result in military discipline.<sup>19</sup> There is evidence that this is beginning to improve, with more armies beginning to teach the laws of war seriously. However, the situation is very far from perfect, and the personal impression of this author, on the basis of speaking with military personnel from around the world, is that their instruction in the law has been patchy or nonexistent.<sup>20</sup> Respect for the law in future wars will depend to a great degree on whether instruction on the pertinent rules is improved during military training and whether the necessary sanctions are imposed, preferably by the soldier's own country, in case of violations.

*The Need to Repress Violations of the Law.* The fact that international humanitarian law has not been considered to be of major importance by States is reflected in their failure to require the prosecution of war criminals; more than fifty years after the Geneva Conventions entered into force most countries have still not carried out their obligation to provide for compulsory universal jurisdiction over grave breaches. However, there can be no doubt that the prosecution of such criminals would go a long way toward convincing combatants of the serious nature of the law, rather than perpetuating its present image of theoretical lip-service, or at most of double standards by which some are prosecuted and others not.<sup>21</sup>

There is at present quite a good chance that an international criminal court will come into being in the next century, but whether this helps the image of international humanitarian law or hinders it will depend almost entirely on the jurisdiction of the Court. The present draft contains two provisions that could seriously harm how it is perceived: that the United Nations Security Council can prevent the Court from hearing such a case if it is itself dealing with the conflict in question;<sup>22</sup> and that the consent is required of the custodial State, the State where the act occurred, and the States of which the victim and the accused are nationals—consent that is in addition to their ratification of the treaty!<sup>23</sup> These draft provisions undermine both the notion of universal jurisdiction for war crimes and the rule of law, and they are likely to encourage further an image of double standards. In particular, the provision that requires the consent of the State of which the accused is a national would notionally



provide a form of State immunity to war criminals. As the whole purpose of an international criminal court is to assure the prosecution of war criminals if they are not tried by their own courts or extradited for trial, it is essential that the court have inherent jurisdiction for such crimes. Otherwise, in the next century implementation of the duty to repress war crimes will prove no better than before.

*The Influence of Society in General.* Both an effective international criminal court and respect for the rules by combatants during conflicts depend on a genuine and clear understanding of the importance of limits in warfare and of respect for persons under control of an adversary. Detailed rules will inevitably vary over time to accommodate changes in society and in methods of warfare, but it is important to preserve the basic values. If these were viewed as important by society in general, soldiers would perceive them as normal when taught them during military training. The most insidious problem is that many persons are of the opinion that war should know no rules and that the only way to deal with adversaries is to be stronger, more prepared than they are, and willing to use any means to accomplish one's aims. This is based on a belief that such means are necessary for personal and national survival. Unfortunately, this is what the new generation seems to be primarily taught, through the media and war-play computer games. The same means could instill humanitarian law values, but unfortunately it is obvious that humanitarian law is either unknown or not believed in—or considered completely irrelevant—by those who produce these games and programs. This is a vicious circle that must be rectified somehow. Otherwise, we could face a situation in the next century where, with weapon developments which could be even more dangerous than those of this century, the rulers and combatants will be uninterested in upholding the values of international humanitarian law.

*The Influence of International Human Rights Law and Human Rights Organizations.* In the second half of the twentieth century the driving factor in keeping notions of limits on behavior in wartime alive has been the development of human rights law. Despite the totally unrelated origin of this law—it was primarily motivated by a desire to render governments accountable for behavior towards their own citizens—the humanitarian, protective purpose of human rights law has had its influence on the views of certain parts of the international community.<sup>24</sup> The horrors of the Second World War not only led individuals to pressure States to include the promotion of human rights as a basic purpose of the United Nations<sup>25</sup> but also led to the creation of “crimes against humanity” as an international offense and to conclusion of the 1948 Genocide Convention. Nor is it a coincidence that non-international armed

conflicts were regulated by treaty for the first time in 1949.<sup>26</sup> A major step was taken at the 1968 United Nations Human Rights Conference in Teheran, where a resolution entitled "Human Rights in Armed Conflict" encouraged States to afford more respect to existing humanitarian conventions and to add further rules to protect "civilians, prisoners and combatants in all armed conflicts."<sup>27</sup> The influence of human rights law can be clearly seen in the wording of the fair trial guarantees in the 1977 Protocol II Additional to the Geneva Conventions.<sup>28</sup> (Ironically, humanitarian law could have usefully influenced human rights law at that time, for the judicial guarantees found in the Geneva Conventions were not listed as nonderogable rights in the European Convention of Human Rights nor in the United Nations Covenants. Practice since then has shown that this was a mistake.)<sup>29</sup>

In some respects, the influence of human rights law was inevitable, for much in the Geneva Conventions that is devoted to protecting individuals overlaps with a number of civil rights as well as with economic and social ones. However, a major difference is that humanitarian law concerns itself with behavior by *all* parties to a conflict, a concept particularly important in non-international armed conflicts and for which human rights law is not entirely suited. We will return to the particular problem of such conflicts.

Since the 1970s the United Nations has concerned itself with issues that include important aspects of international humanitarian law in human rights contexts, in particular in the Human Rights Commission and its Subcommission for the Elimination of Discrimination and the Protection of Minorities.<sup>30</sup> Human rights rapporteurs have also been asked to analyze subjects that primarily concern armed conflict. Some rapporteurs are theme based, such as the special ones for mercenaries<sup>31</sup> and for sexual violence during armed conflict,<sup>32</sup> while others are country based, such as those for Afghanistan,<sup>33</sup> the former Yugoslavia,<sup>34</sup> Iraqi-occupied Kuwait,<sup>35</sup> and Rwanda.<sup>36</sup>

The most dramatic recent example of this trend is the present negotiation of a Protocol Additional to the Convention on the Rights of the Child, which will be solely devoted to the recruitment and participation of children in hostilities.<sup>37</sup> There can be no doubt that most of the impetus for these developments comes from nongovernmental human rights organizations, which represent important segments of civil society.<sup>38</sup> Resistance or protest from civil society has also had a major effect on limits on weaponry. The nonuse of nuclear weapons since the Second World War is largely due to such civil protest, as was the desire following the Vietnam war to prohibit the use of incendiary weapons.<sup>39</sup> The call for the ban on blinding laser weapons, although



originated by the governments of Sweden and Switzerland<sup>40</sup> and primarily pursued by the International Committee of the Red Cross, was boosted by the support it received from various human rights organizations.<sup>41</sup> The most stunning recent development in this regard is the ban on antipersonnel mines, agreed to in principle by all States<sup>42</sup> and actively supported by over one hundred of them.<sup>43</sup> In just five years the initial call in 1992 by six nongovernmental organizations led to a coalition of about a thousand such entities, collectively referred to as the International Campaign to Ban Landmines.<sup>44</sup> In 1997 it received the Nobel Peace Prize for its work. The efforts were not entirely civilian, for the original founder of this coalition was the Vietnam Veterans of America Foundation,<sup>45</sup> and there can be no doubt that the decision by the International Committee of the Red Cross in February 1993 to support such a ban helped the process enormously.<sup>46</sup> Certain military personnel were also supportive of the process, by indicating that the harmful effects of antipersonnel mines outweigh any military utility they may have—a classic humanitarian law approach.<sup>47</sup> However, despite some military support, there can be no doubt that the trend at present is for civil society to push most actively for restraints in methods and means of warfare and in the protection of its victims.

What does this bode for the future? On the one hand, if this trend continues, it means that humanitarian law principles are still being fought for by some members of society. This should have the effect of saving at least some of the law. If this concern filters down to the average person to the extent that potential combatants consider restraint in armed conflict natural, a positive development will have taken place. If, on the other hand, we continue to have a clash of interests, with civil society continuing to make Herculean efforts to regulate one aspect of the law at a time, its efforts could be overtaken by contrary military or technological developments, and the tension between legal principle and practice will continue into the next century.

*Ease in Application of the Law.* This issue is highly pertinent for the implementation of the law relating to methods of warfare. As already indicated, in the days when law followed practice and warfare largely consisted of hand-to-hand fighting and sieges, there was no particular difficulty in applying the law. However, with the introduction of aerial bombardment and missile warfare, the rules limiting attacks to military objectives and requiring proportionality are not always easy to respect. First, accurate intelligence is necessary in order to ascertain correctly which objects and persons are military objectives and what their exact location is. Secondly, correct identification of protected persons, vehicles, and buildings will continue to be problematic until



more sincere efforts are made to take advantage of the technological possibilities for identification. Thirdly, perfectly accurate weapons systems are still in the minority. Finally, any assessment of proportionality in attack has so substantial a subjective element that it is very difficult to gauge whether the law has been respected.

Faced with these difficulties, both commanders and soldiers are likely to make mistakes, and it is not surprising that the number of civilian casualties has dramatically risen since the beginning of this century.<sup>48</sup> A study by two International Committee of the Red Cross (ICRC) doctors has shown statistically what has always seemed common sense before, namely, the more use that is made of bombs and missiles as opposed to bullets, the greater the number of civilian casualties compared with military ones.<sup>49</sup> It is the extreme difficulty of in practice respecting Protocol II to the Convention on Certain Conventional Weapons applicable to landmines, particularly the rules relating to limitation to military objectives and to marking and recording, that has led the international community to ban antipersonnel mines altogether as indiscriminate weapons.<sup>50</sup>

The phenomenon of fighting from a distance is said to adversely affect also a combatant's care as to the nature of the target, for he will not see the damage that is actually being done.<sup>51</sup> Present trends, with increasing computerization, are likely to exacerbate this problem. Unless major efforts are made to improve the accuracy of identification and the accuracy of weapons generally available, implementation of the law may well become more difficult.

Another aspect of concern is the complexity of the legal régime itself; the more complex the rules, the more likely it is that they will not be followed accurately. This has been seen in the context of the law of naval warfare, where not only has there been no general treaty regulation since 1907, but the rather complex traditional customary rules were also extensively violated during the Second World War.<sup>52</sup> Even the Nuremberg Tribunal, in the cases of Admirals Doenitz and Raeder, confused the two separate notions of rescue after sinking of a vessel and removal of personnel before sinking in situations where capture is not possible.<sup>53</sup> It is for this reason that during the drafting in 1994 of the San Remo Manual on International Law Applicable to Armed Conflicts at Sea<sup>54</sup> this author argued for a simple rule prohibiting the attack and capture of passenger vessels carrying only civilians—rather than allowing capture and even destruction subject to certain rules, as now provided.<sup>55</sup>

The desire for simplicity can also be seen in the disappointment of many States with the complex rules for the use of antipersonnel mines in Protocol II Additional, as amended on 3 May 1996, to the Convention on Certain

Conventional Weapons. Convinced that this would not really work in practice, they went on to adopt the straightforward ban on antipersonnel mines in Oslo in September 1997. The ban was embodied in the Ottawa Treaty in December.

*Attitude toward the Enemy.* The prohibition of aggression, the rise in ideological wars, and the increasing intensity of non-international armed conflicts have all had the effect of introducing additional personal hatred for the enemy in the twentieth century.<sup>56</sup> For these reasons, the murder of civilians is particularly acute in non-international armed conflicts, an issue that will be revisited later. Unfortunately, in that there appears to be no downturn in this trend, the problem could well become much worse in the next century, making implementation more difficult, if not impossible in some situations. The present rise in fundamentalism and fanaticism is extremely perturbing in this regard. It is clear that in order to avoid the worst, the international community will need to make a particular effort to try to solve certain situations of tension caused by ethnic rivalries or other ideologies. It will also need to be more assiduous in punishing violations of the laws of war, including those in non-international armed conflicts. More serious efforts should also be made to limit the extent of proliferation of weapons, including small arms, to try to minimize the effects of such wars.

*Mental Health of Combatants.* The longer the period of tension, the more likely it is that combatants will suffer from combat stress disorder and have greater difficulty in maintaining the discipline necessary to respect the rules in threatening situations.<sup>57</sup> Suggestions on improving this situation<sup>58</sup> include ensuring that weapon effect does not induce a sense of total helplessness in the soldier,<sup>59</sup> and giving soldiers leave on a regular basis.<sup>60</sup> The difficulty in accurately identifying hostile objects from a distance is exacerbated by stressful situations, a fact very clearly seen in the case of the USS *Vincennes* and its attack on the Iran Air airbus in July 1988. Both the International Civil Aviation Organization report and that undertaken by the United States attribute the mistake to the feeling of tension on board the *Vincennes* at the time and the conviction by the crew that they could well be attacked that day. This led a technician to so misread the information on the computer screen that he believed the opposite of what he saw.<sup>61</sup> This mistake occurred in circumstances that did not amount to a full-scale conflict, so one can only assume that in intensive armed conflict such mistakes will be more frequent. Close range and rapid approach of a hostile object makes the tension particularly acute.



Unfortunately, the situation is likely to get worse in the future if major developments in directed-energy weapons go ahead. This is primarily because the effects of such weapons are virtually instantaneous and may well occur over large distances, thus increasing the feeling of inability to defend oneself. Inappropriate preemptive attacks may well result, leading to further attacks on protected or civilian persons or objects.

### Changes in the Structure of International Society

*Inter-state Armed Conflicts Are in the Minority.* This situation is not in itself unfortunate, for it shows that the rules prohibiting the use of force by one State against another have had some effect. This author is also not convinced that internal armed conflicts have actually become more numerous as such; rather, we are more aware of what is going on in all parts of the world, and the level of weaponry now available in such conflicts means that they have a more serious effect on the population. The extent of political and commercial intercourse between States also means that the effects of such conflicts are far more serious in international relations than they used to be. However, the facts remain that inter-State conflicts are in the tiny minority and that unless this situation is seriously addressed, most of international humanitarian law is at risk of being perceived as largely irrelevant to modern realities.

It is an obvious truism that international law is primarily aimed at regulating relations between States, human rights law notwithstanding. Despite Article 3 common to the Geneva Conventions and Additional Protocol II, the detailed rules of international humanitarian law have been largely developed for international armed conflicts. The easiest legal application is in the case of a classic conflict between States. It is also a truism to state that far more numerous than international armed conflicts are non-international armed conflicts and actions by various international peacekeeping or peace-enforcement groups.

Present trends seem to show that this situation is likely to continue into the next century. We are witnessing not only the breakup of a number of nations and increased stress on local government within nations, but also an increasing trend towards supranational law in the form of economic and political international organizations with extensive lawmaking powers and increasing influence in international affairs. At the same time, force is being used quite extensively by private groups of a financial or criminal nature, with effects that cannot be ignored. The challenge of the next century will be how to deal effectively with these developments. It will require a willingness to venture into



legal regulation that does not rely on classical methods of qualifying a conflict, which at present can determine only whether a conflict is international or non-international.

**Non-International Armed Conflicts.** In practice, soldiers are not trained in two different ways, and this is reflected by the fact that most existing military manuals do not include one set of rules for international armed conflicts and another for non-international ones. The problem is mostly one of principle. It is unfortunate that a number of States are still unwilling to admit the formal applicability of more detailed rules for non-international armed conflict; their view is that this would amount to some kind of interference in their internal affairs or could be seen as granting international recognition to opposing forces. The negotiation of Additional Protocol II illustrated the widely differing views of States on this important issue.<sup>62</sup>

*The Principle of Application of International Humanitarian Law.* There being no indication that non-international armed conflicts are dropping in number, we are likely to see a continuation of this problem in the next century. In principle, professionally trained soldiers should be able to use the same methods for international and non-international armed conflicts.

*Application by Governmental Armed Forces.* As far as behavior by government armed forces and other governmental institutions is concerned, they are in law bound by the wording of Common Article 3, Protocol II, where applicable, and relevant human rights law. As indicated above, willingness to regulate internal armed conflicts by treaty arose when international human rights law came into being. However, States that are not keen on human rights law tend also to resist further regulation of internal armed conflicts in international humanitarian law. The difficulties during the negotiation of Protocol II were such that the compromise which resulted in the definitive text came at the last minute, allowing very little discussion on the final wording. This has resulted in an incongruous situation, in that some of the rules in Protocol II<sup>63</sup> are more absolute in their protections than those to be found in Protocol I; it is obvious that reference to the equivalent articles in Protocol I will be necessary for their interpretation in practice. It is also hoped that the study presently being undertaken by the ICRC on rules of international customary law will further elucidate the rules generally accepted as being applicable in non-international armed conflicts.<sup>64</sup> It is quite likely that the study will indicate points of weakness where the international community could be encouraged to continue work towards greater specificity.

There is one area, however, where application of the rules by governmental armed forces is difficult—the distinction between the civilian population and others. Common Article 3 does not define what is meant by the “armed forces” of the other party, nor is there any definition of who are considered to be combatants. Civilians are referred to simply as persons who do not take an “active” part in the hostilities. Does this mean that all other persons are combatants that can be attacked? What does “active” mean? Is it the same as the term “direct” found in Article 13 of Protocol II? Article 1 of Protocol II is better in this regard, as it describes the type of dissident armed forces that need to exist for Protocol II to come into effect. One could assume that only persons belonging to such groups are combatants and that all other persons are civilians. However, Article 13, paragraph 3, speaks of the protection of civilians unless they take “a direct part in hostilities.” This could be interpreted as meaning that all persons that do not take such a direct part are civilians. However, this interpretation could conflict with the concept of “armed forces” referred to in Article 1, and it may well be that the reference to “direct” participation is only the equivalent of Article 51, paragraph 3, of Protocol I.

These issues are not academic but rather very practical ones that regularly arise when attempting to assess whether certain attacks are lawful or not. It is very common in internal armed conflicts to have persons who mostly lead normal lives yet indulge in guerrilla activities from time to time. Can they be attacked at any time and in any place? We also find the phenomenon of civilians armed and trained to fight, ostensibly for their own protection, but also for the purposes of those who trained them. What is their status? What is the status of children who are asked to deliver messages to guerrilla groups, especially messages that are important for intelligence purposes? A major effort should be made to find answers to these basic questions so that the lawfulness of acts in non-international armed conflicts can be more readily assessed in the future.

*Application by Non-governmental Forces.* As to the behavior of non-governmental groups, there are both theoretical and practical problems. The application of international law to non-governmental groups is still perceived by many governments as problematic despite the existence of Common Article 3 and the ratification of the Geneva Conventions by virtually all States. Recent attempts by the government of Colombia to indicate clearly that the new treaty banning antipersonnel mines applies to non-State entities ran into difficulties when certain Western governments could not accept the proposition that such entities might have responsibilities under international law.<sup>65</sup> In the end, Colombia had to content itself with the preambular



paragraph indicating that the rules of humanitarian law apply to all parties to a conflict, and a statement at the closing session as to the importance of this point—a statement supported by the ICRC at the same session.<sup>66</sup>

Another example of the same problem arose in the context of the negotiations for the Protocol to the Convention on the Rights of the Child.<sup>67</sup> A number of States and the ICRC spoke in favor of a rule that would prohibit all parties to a non-international armed conflict from recruiting children under the age of eighteen years.<sup>68</sup> Several States could not accept this, and the draft now indicates two possible methods of dealing with this issue, neither of which is satisfactory. Draft paragraph 2 merely states that the government is to ensure that children under eighteen are not recruited;<sup>69</sup> draft “New Article A,” presently in square brackets, would require governments to “take all appropriate measures to prevent recruitment of persons under the age of 18 years by non-governmental armed groups involved in hostilities.”<sup>70</sup> These proposals may be doctrinally pure in the minds of strict international lawyers, but they are hardly useful when it comes to the actual behavior of non-governmental groups.

The application of human rights law concepts to non-governmental forces is far more problematic than that of humanitarian law concepts. This is because human rights law is primarily conceived as consisting of the obligations of the government towards its own population, not the other way around.<sup>71</sup> This principle was another reason why a reference to the duties of non-governmental groups was not accepted for the draft Protocol to the Convention on the Rights of the Child.<sup>72</sup> Humanitarian law, on the other hand, is meant to apply to both parties to a conflict; indeed, the very notion of equality of obligations is fundamental to the nature of this law. However, a major problem is that although States wished these obligations to be made clear in Common Article 3 and Additional Protocol II, they did not wish the corollary to be true, i.e., the same rights for rebel forces.

One of the most important motivating factors for the respect of humanitarian law is the right to the status of prisoner of war, and the certainty of not being punished if one has not violated the rules of international humanitarian law. Given that this is not the case in internal armed conflicts, what is the motivating factor for non-State entities to abide by international law? They can hope to gain some respect, perhaps, and there is also the recommendation in Article 6, paragraph 5, of Protocol II that the broadest possible amnesty should be granted at the end of hostilities. It is assumed, although not specifically indicated, that such amnesty should not apply to those who have violated humanitarian law, at least in any serious way.



However, this does not seem to be very persuasive, and another method will need to be found to create a motivation to abide by the rules of international law. In this regard, one could consider both the carrot and the stick. The carrot could be, for example, allowing respect of international law rules to be used in mitigation of sentence when such persons are tried in national courts. The stick could be more rigor in trying violators of the law before international tribunals, such as that created for Rwanda, the statute of which specifically lists crimes that are violations of international humanitarian law applicable in non-international armed conflicts.<sup>73</sup> For this reason, this author hopes that the new Statute of the International Criminal Court will include such crimes.

Given that many persons using force in non-international armed conflicts have not been members of an official State army, it is not surprising that they are quite unaware of even the existence of rules applicable to such situations, let alone their content. The ICRC tries to teach some of these rules to such forces and has had some success, but its approach has certainly not always worked.<sup>74</sup> The only way to make such forces have some idea of these rules is to ensure that the civilian population as a whole is aware of them. This is certainly not the case at present, and most governments have made no particular effort to remedy this situation. In light of the increasingly destructive and destabilizing nature of non-international armed conflicts, a determined and serious effort in this regard must be made in the next century. However, it should be realized that knowledge of such rules cannot assure that they will be perfectly respected, even if supported by nongovernmental groups. As indicated above, some of the rules relating to the conduct of hostilities require quite sophisticated training and means. Therefore, the goal must be to reduce the incidence of direct attacks on civilians, torture, and other acts from which the forces involved could abstain if so inclined.

*The Problem of Weapons Availability.* The final element of particular importance in relation to such conflicts is the ready availability of weapons. The end of the Cold War and relaxation in regulations relating to arms transfers led to significantly increased availability of weapons. The ICRC has been asked by the twenty-sixth International Conference of the Red Cross and Red Crescent to submit a report indicating whether there is a direct link between this availability and violations of the law.<sup>75</sup> This author suspects, using an analogy, that this effort will experience the same difficulty of proof as did the connection between smoking and cancer but that common sense dictates that it must be so. The more persons who without instruction or special training use force and have firearms, the more violations there are likely to be. This situation will get worse in the next century unless the international community

finds the political will to stem such arms flows. This will require not only the creation of clear guidelines for transfers but also a means to verify their implementation.

***The Use of Armed Force by Private Persons or Groups.*** The armed forces of private entities can take the form of mercenaries (although not a new phenomenon, one that has caused particular problems at the end of this century), security companies (hired by private industry), or criminal groups with extensive organization and war-making ability.

*Mercenaries.* The use of mercenaries is an ancient practice that shows no indications of ceasing. In the past such persons simply had the same status, and were entitled to the same treatment, as the group for which they were fighting, which in turn depended on whether the conflict was international or non-international. However, since 1977 a significant segment of the international community has tried to eliminate this practice by, inter alia, refusing such persons prisoner-of-war status.<sup>76</sup> So long as mercenaries continue to exist, the problem of how to motivate them to abide by the rules of international humanitarian law will remain. In this regard, the carrot-and-stick approach suggested for nongovernmental groups in non-international armed conflicts could prove useful.

*Private Security Companies.* A relatively new phenomenon is the practice of private security companies offering their services to governments or private industries, particularly in unstable areas where the government's normal police force cannot provide adequate protection. The best known example is "Executive Outcome," a security company which operates quite extensively in Africa; a number of others are active in a variety of contexts.<sup>77</sup> Although such companies are frequently referred to as "mercenaries" in the media, they do not fall within the traditional understanding of the term, nor do they easily fit within the legal definition found in Article 47 of Additional Protocol I.<sup>78</sup> However, they do use military methods and consist primarily of ex-soldiers.

A major issue is whether security companies are bound by any international rules. When used by governments in the context of an internal armed conflict, it is arguable that they form part of the government's forces and thus are bound by the rules of non-international armed conflict. However, they are not officially part of the government's army. Moreover, the concept of mercenaries in Article 47 of Protocol I applies only in international armed conflicts. Insofar as multinational or other industries use such companies, they ought to be accountable in some way for their behavior; yet they are neither a State nor a party to an internal armed conflict in any traditional sense of the word. The



security companies concerned are in principle bound by the law of the State in which they function. In reality, this will not have much effect if they actually engage in hostilities, which press reports say that they have done in some instances. Given the increasing influence of private industry and the growing importance of multinational companies, the international community is going to have to face this issue and decide whether the use of force by such companies against armed groups should be subject to international rules. If so, a departure will have to be made from the traditional application of international humanitarian law to governments and armed rebel groups.

*Criminal Groups.* Criminal groups engaging in armed conflict include the Mafia and various "drug lords," whose activities are extensive not only internally but internationally. On the one hand, it seems abhorrent to suggest that they should be bound by international humanitarian law. On the other, it is difficult in law to justify any distinction inasmuch as traditional rebel groups in non-international armed conflicts are also considered common criminals by the authority they are opposing. The term "armed groups" in common Article 3 is arguably general enough to cover criminal groups, but one generally assumes that humanitarian law has in mind groups fighting for a political purpose. This assumption derives from the historical context of the development of the law, but it is written nowhere. An added complication is that some rebel groups, including a number in Colombia, ostensibly have some political purpose (albeit often obscure), though they use straightforward criminal methods and drug money.<sup>79</sup> The lack of clarity as to whether international law is applicable in these situations makes its implementation very difficult. Even if one assumes, as this author does, that a group should possess some political purpose if humanitarian law is to be applicable, there remains the problem of determining the facts. Doing so can be extremely difficult in unstable, internal conflict situations. A tragic example of this was the murder of six employees of the ICRC on 17 December 1996 in Novye-Atagy, Chechnya. Although an official enquiry has opened, we are at the time of writing still no nearer to establishing who was responsible, or even whether the attack clearly amounted to a violation of international humanitarian law, given that the various groups active in that highly volatile situation included both the criminal Mafia and armed political groups.<sup>80</sup>

Unfortunately, there is every indication that this type of unstable situation is likely to continue or even worsen in the next century. At the moment, international law does not really have an answer.<sup>81</sup> In particular, international humanitarian law, which is supposed to regulate the use of force, does not in its



present form provide concrete and practical answers as to how the law can be applied to and implemented in such situations.

***Use of Force by Multinational and Supranational Entities.*** The use of force by the United Nations was foreseen in Chapter VII of the United Nations Charter, which also assumed that the forces would be UN forces as such. However, only fairly recently has the question of whether the United Nations is bound by international humanitarian law been addressed in any serious way. The issue is not limited to the UN. Multilateral forces, whether acting under the umbrella of a regional security organization such as NATO or as *ad hoc* coalitions, also face the challenge of establishing which law applies. This issue is at present largely considered from the perspective of interoperability. The increasing financial and political interdependence of States is also leading to a situation where supranational actors could be increasingly active in armed conflict issues, the most obvious example being the new European Union's Treaty of Amsterdam. This trend means that international humanitarian law can no longer be limited to the behavior of individual nations; otherwise, the defense policies of such organizations and their use of force will not be formally bound by any hard humanitarian law.

***United Nations Forces.*** The issue of which law binds United Nations forces is not a purely academic one. There have been allegations of violations of the law, particularly in the case of United Nations operations in Somalia, wherein UN forces have been accused of murdering noncombatants and of detaining Somalis without allowing contact with lawyers or their families.<sup>82</sup> Through participation agreements, personnel contributed by States fall formally under the command of the UN Secretary-General. Further, the United Nations is an international person in international law. Therefore, although one could argue that each contingent is still bound by the humanitarian law that binds its flag State, this conclusion is not at all satisfactory from either a legal or a practical point of view. The area of practice is actually rather confused, with the UN force commander being in theory responsible but with heads of national contingents retaining a certain control.<sup>83</sup> The actual name given to the force should be irrelevant, as the question of applicability of humanitarian law should arise when hostilities actually occur, whether the contingent was meant to be a peacekeeping force in the traditional sense or was given a more active role.<sup>84</sup>

The difficulty at present is that apart from cases of clear enforcement action, UN forces are not meant to be seen as belligerents in the traditional sense of the term. Humanitarian law is meant to apply to "parties to a conflict;" the

normal role of peacekeeping forces does not fit easily into this description. The fact that the United Nations is not a party to humanitarian law treaties compounds the problem. In past operations, agreements have indicated that such forces are bound by the principles of humanitarian law but not by a specific list of humanitarian law rules.<sup>85</sup> The current UN model agreement provides that such forces "observe and respect the principles and spirit of the general international conventions applicable to the conduct of military personnel."<sup>86</sup> The ICRC has tried through expert meetings to establish which rules are applicable to such forces, both when they intervene in non-international armed conflict situations and during international armed conflicts.<sup>87</sup> Given the difficulty of finding an answer (which this author believes is insuperable because the law simply does not envision the situation), the experts concerned drafted a document entitled "Guidelines for UN Forces Regarding Respect for International Humanitarian Law."<sup>88</sup> The fate of this work is not clear, as these guidelines have not been officially adopted. However, personnel at the UN Secretariat are aware that it is an issue that needs resolving.

It is highly likely that such forces will continue to be used in the next century, and it is simply not acceptable to allow it to remain unclear which international legal rules govern UN forces. The international community will need to accept and address the fact that while UN forces use force, the traditional scope of the application of humanitarian law treaties prevents the proper implementation of suitable rules for such forces.

*Multinational Forces.* Multinational forces can be specifically authorized by the United Nations, either for an enforcement action, as with the coalition effort against Iraq in 1991, or to conduct a humanitarian mission, such as that in Albania.<sup>89</sup> In principle such forces apply humanitarian law by virtue of the international law obligations undertaken by each State. However, with such official authorization, the question arises as to whether such forces should undertake as a group to apply specific rules of humanitarian law. Not all States will be parties to the same treaties, and therefore problems of interoperability arise. This is true for forces of a regional organization such as NATO,<sup>90</sup> or *ad hoc* forces, like the multinational forces in Beirut in 1982–1984<sup>91</sup> or Liberia in 1990.<sup>92</sup>

In that it is quite likely that multinational forces will continue to be used in the next century, proper implementation of humanitarian law requires greater clarity as to the rules under which they will operate and how those rules will be carried out in practice.

*Supranational Organizations.* Although there is no such thing as “supranational” law—a matter of concern to some purist international lawyers—the fact remains that there are arrangements whereby States have given non-national organs powers that go well beyond the usual functions of international organizations. The most obvious example of this is the European Union. The Treaty of Amsterdam, adopted in 1997, contains provisions in Title V on a “common foreign and security policy.”<sup>93</sup> Article J.3 states, “The European Council shall define the principles of and general guidelines for the common foreign and security policy, including for matters with defence implications.” More specifically, Article J.7 provides that:

The common foreign and security policy shall include all questions relating to the security of the Union, including the progressive framing of a common defence policy . . . which might lead to a common defence, should the European Council so decide. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their constitutional requirements.

The Western European Union (WEU) is an integral part of the development of the Union providing the Union with access to an operational capability. . . . It supports the Union in framing the defence aspects of the common foreign and security policy as set out in this Article. The Union shall accordingly foster closer institutional relations with the WEU with a view to the possibility of the integration of the WEU into the Union, should the European Council so decide. . . .

The progressive framing of a common defence policy will be supported, as Member States consider appropriate, by co-operation between them in the field of armaments.

Questions referred to in this Article shall include humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacekeeping.

The Union will avail itself of the WEU to elaborate and implement decisions and actions of the Union which have defence implications.

Although the provision does not mean that the European Union will have its own army as such, it comes close. More importantly, the Union is to have its own policies relating to armed conflict situations, whether for its own defense or in relation to other armed conflicts. The European Union as such is not a party to humanitarian law treaties, but the question arises as to whether it is



bound by them. Does customary law bind it? These are fundamental questions for the implementation of humanitarian law.

The ICRC attempted to persuade European Union States to include references to international humanitarian law in the sections of the treaty dealing with foreign and security policy.<sup>94</sup> Other parts of the treaty make reference to the importance of respecting human rights law; therefore, such a mention of humanitarian law in the relevant sections would have been totally appropriate. These efforts were unsuccessful, an extremely unfortunate outcome in this author's opinion.

In the light of such developments, States cannot continue to simply assume that the present scope of application of humanitarian law treaties suffices. What if the European Union uses the WEU in an internal armed conflict in a way that involves fighting? Does all law apply, or only that law applicable to internal armed conflicts? What of the duty of States in common Article 1 of the Geneva Conventions to respect them and ensure their respect? Does the obligation also apply to policies of the European Union as such? Which body will implement whatever is supposed to be the applicable law? The European Court of Justice even though there is no mention of humanitarian law in any of the European Union treaties? Do the general references to human rights in the Maastricht and Amsterdam treaties suffice? Such issues will have to be faced in the future, although it would be better to do so before becoming involved in a difficult situation.

### **Implementation Mechanisms**

It may seem strange in an article about implementation to refer to implementation mechanisms only rather briefly, in closing. However, this author believes that the preceding issues are more fundamental to the problems of implementation procedures. Mechanisms will only be efficient if the will exists to make them so, and that depends on the factors outlined earlier. Therefore, this section will not explore existing and potential implementation mechanisms in detail;<sup>95</sup> rather, it will look at factors that are relevant for such mechanisms in the future.

**National Mechanisms.** Obviously, if the implementation mechanisms already foreseen for the national level had been carried out, we would be in a much better situation than we are now. In the face of the enormous challenge of rectifying the present situation, the ICRC's new Advisory Service<sup>96</sup> has had to set priorities.<sup>97</sup> It has therefore decided to try to create a snowball effect by

encouraging the creation of national commissions responsible for national implementation of humanitarian law.<sup>98</sup> It is also making particular efforts to induce States to comply with their duty under the Geneva Conventions to provide for universal jurisdiction for grave breaches.<sup>99</sup> In this regard, there can be no doubt that if States could arrange for the direct applicability of the treaty provisions, a great deal would be gained. This could perhaps ultimately make national courts able not only to try war criminals more effectively but also to award reparation to victims of violations. At present, the latter possibility is being explored by the Human Rights Commission,<sup>100</sup> and there are cases being brought by individuals before national courts asking for reparations for violations committed during the Second World War.<sup>101</sup> Success by such individuals would almost certainly motivate governmental and nongovernmental bodies to abide by their obligations with greater care.

Some imagination and determination will also be needed to make sure that the civilian population as a whole is aware, at least at the most basic level, of certain rules of armed conflict. In formal teaching, the topic could be introduced into a number of traditional school courses, probably together with some notions of human rights. However, other methods will also be necessary. In particular, efforts should be made to stem teaching that encourages violations of the law. For example, behaviors that should not be introduced in computer games could be made known to game creators, and those that should be promoted could be. It has already been suggested that industries developing new weapons should become aware of certain international rules. They have at least one strong motivation for making an effort to do so, namely, the thought of the money they would waste should they develop a weapon that is then formally prohibited!

**International Mechanisms.** Reference has already been made to the importance of an effective international criminal court, and to the conditions that are necessary for one. Provision for commissions of inquiry already exists,<sup>102</sup> and some investigation has occurred on an *ad hoc* basis, such as the investigation into violations of the law in the former Yugoslavia<sup>103</sup> and Rwanda,<sup>104</sup> and the country rapporteurs established in the context of the Human Rights Commission.<sup>105</sup> Assessing violations of methods of warfare will remain particularly difficult, because factors relating to the assessment of military objectives and proportionality have an important subjective element. However, such inquiry remains a useful mechanism, and it is hoped that it will be used more in the future.

It remains to be seen whether other mechanisms could be introduced that would be useful to encourage better implementation of humanitarian law in



future wars. The suggestion has been made to introduce a reporting system in which States could inform a body on the measures they have taken to implement humanitarian law.<sup>106</sup> Such reporting systems are being used in other contexts, with mixed results (determined by a number of factors).<sup>107</sup> In the context of humanitarian law, such a system would have greater likelihood of acceptability and success once States have taken more effective national measures, which it is hoped will be the fruit of the Advisory Service's efforts and of the fuller understanding being gained these days of the importance of this aspect of law.

One area that should certainly be improved is the evaluation, at the research stage, of the likely lawfulness of weapons.<sup>108</sup> At present, evaluations are made either at the national level or at the international level if a particular weapon is called into question. In the latter case, assessments are hampered by the lack of unclassified information. The case of blinding laser weapons was somewhat special because there had been extensive use of lasers by ophthalmologists for eye surgery and by the military for nonoffensive purposes; this enabled experts to extrapolate the likely features and effects of the forthcoming proposed weapons.<sup>109</sup> In most cases, however, a weapon has to appear on the battlefield, and even be generally available, before an evaluation can occur. Obviously, there will be resistance to legal evaluation at this stage given the investment that will have gone into its development. Over the last hundred years, no State leader has shown the kind of altruism that the czar of Russia did when he convened an international conference to ban a weapon developed by his own scientists!<sup>110</sup>

This author is well aware of the highly sensitive nature of this issue, but given the crisis in the implementation of humanitarian law created by the totally new weapons of the twentieth century, and given the need for practice to be in conformity with law rather than in constant tension with it, an evaluation of the foreseeable effects of contemplated new weapons is the only way to implement this area of law effectively. Such an evaluation cannot be left to a totally national mechanism, but must include unbiased and neutral persons. With present rapid technological and biotechnological developments, this will be crucial for the twenty-first century. This process would be helped by the establishment of more objective data and criteria for evaluating whether certain weapons present problems in relation to the rules prohibiting inherently indiscriminate weapons or those that cause superfluous injury or unnecessary suffering.<sup>111</sup> A mechanism will also need to be found that will sufficiently protect the sensitive nature of the material. This author believes that if the political will were present, it would not be impossible to find one.



Such a mechanism could also study the likely effects of means or methods of warfare on the environment.<sup>112</sup> The relative novelty of this problem makes it difficult at present to foresee with accuracy the extent and permanence of environmental damage that will occur. However, with the degree of present environmental degradation, the world's ever-increasing population, and forecasts of water shortages,<sup>113</sup> all the elements of future disaster are present. Not only are these factors likely to be the cause of a number of wars in the next century, but the problem will be exacerbated if means or methods of warfare significantly contribute to further environmental damage.

Although it is a sensitive issue, further thought needs to be given to the fact that the possibility of nuclear war remains. Despite all efforts to stem proliferation, it is not impossible that a State or group could decide to use these weapons without fearing or caring about retaliation. All existing mechanisms to prevent such an occurrence need to continue. In addition, now that the Cold War has ended, more serious attention should be given to the Advisory Opinion of the International Court of Justice that there is an obligation to achieve "nuclear disarmament in all its aspects under strict and effective international control" through *bona fide* negotiation.<sup>114</sup>

Reference has already been made to the need to find better means to implement humanitarian law in non-interstate conflicts. Specific mechanisms should also be considered, for implementation by international and "supranational" bodies, of a system of reparations for victims of violations and of punishment for offenders. The implementation of the law in non-international armed conflicts and in so-called "internationalized" ones would benefit from an independent and impartial qualification of the conflict. The ICRC frequently does not do this publicly because of possible implications for its field work. The ideal situation, of course, would be for an independent court to undertake this task, but it could also be given to an independent commission. The experience of human rights law shows that mechanisms allowing for individual petition are particularly successful in ensuring that issues are addressed.<sup>115</sup> Through this channel, cases relating to situations which may qualify as armed conflicts have been brought under the European Convention on Human Rights, but the European Commission of Human Rights or European Court of Human Rights does not have to make such a qualification, as it is unnecessary for the application of human rights law.<sup>116</sup>

Finally, it is worth addressing the particular role of civil society, in particular nongovernmental organizations. Until now the implementation of humanitarian law has been largely left to governments.<sup>117</sup> The only official nongovernmental role was that given to the ICRC, in particular through its

visits to prisoners of war<sup>118</sup> and civilian internees<sup>119</sup> and its role relating to the Central Tracing Agency<sup>120</sup> in international armed conflicts. A recognition of additional roles that it may undertake, with the consent of the parties to the conflict, is found in various other parts of the Conventions, including roles during non-international armed conflicts. References are also made to national Red Cross or Red Crescent societies. The recognized role of the ICRC in fostering the development of humanitarian law means that in practice it is given observer status at diplomatic conferences relating to international humanitarian law.<sup>121</sup> In this context it is frequently requested to prepare documentation and allowed to make statements and proposals.

Until now, other organizations have not had any such formal role. Therefore, it was a significant development when the Norwegian government decided to allow the International Campaign to Ban Landmines the same observer status as the ICRC during the diplomatic conference that led to the adoption of the antipersonnel mine ban treaty in September 1997. The contribution of this organization is specifically mentioned in the preamble to the treaty, the relevant paragraph of which makes a point of “*stressing the role of public conscience in furthering the principles of humanity as evidenced by the call for a total ban of antipersonnel mines and recognizing the efforts to that end undertaken by the International Red Cross and Red Crescent Movement, the International Campaign to Ban Landmines and numerous other non-governmental organisations around the world.*”<sup>122</sup> Language from the Martens Clause was intentionally included.<sup>123</sup> This means that the “Ottawa process,” which culminated in signature by many States of the treaty banning antipersonnel mines in Ottawa in December 1997, specifically recognized the importance of civil society monitoring the implementation of humanitarian law and being involved in its development where appropriate. Those States which did not participate in this process cannot be said to approve this practice, and therefore one cannot say that it is a universally accepted tendency. However, it does reflect the already existing practice of human rights bodies giving a recognized role to nongovernmental organizations.<sup>124</sup> The next century may well see, therefore, an important development in this direction for humanitarian law.

### **Conclusion**

The twenty-first century could easily witness a catastrophic lack of humanitarian law implementation, with much of it being seen as irrelevant because the vast majority of conflicts are not classic inter-State ones.



Dangerous new means and methods of warfare, ideological conflicts, and further rampant arms proliferation, all taking place in the context of an increasingly disturbing environmental situation, could easily spell disaster. Political will could prevent such a scenario, but this requires a willingness to depart from the usual way of thinking. Efforts should be made to establish how the law can be applied to nontraditional situations, and effective mechanisms put in place. Whether this will be done essentially depends on how important the regulation of armed conflict is considered to be when balanced against competing interests. It also depends on whether one is willing to be farsighted and realize the long-term interest in preserving the values of humanitarian law—an application of enlightened self-interest. The author is enough of a realist not to expect this to happen by itself. However, certain tendencies do give hope. Humanitarian law is more talked of these days than it was even a few years ago, and some mechanisms are beginning to work, albeit for the time being in a rather uneven fashion. The further involvement of civil society has been important for this development, and there is no obvious reason why it should weaken in the future. Therefore, it may well be that the implementation of humanitarian law, whatever its exact content needs to be in the next century, will improve compared with this one. One can try to be an optimist!

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### Notes

The views expressed in this paper are entirely the personal ones of the author. They do not necessarily represent the views of the International Committee of the Red Cross, and they in no way engage its responsibility.

1. Throughout this paper, the term “practice” will be used in the sense of actual behavior on the battlefield, and not in the sense given to it for the purpose of assessing customary international law, which would include statements made by States.

2. II Oppenheim, *INTERNATIONAL LAW: DISPUTES, WAR AND NEUTRALITY*, para. 157 (7th ed., Lauterpacht ed., 1952).

3. See SPAIGHT, *AIR POWER AND WAR RIGHTS* 240 (2d ed. 1933); General Orders No. 100, Instructions for the Government of Armies of the United States in the Field, Apr. 24, 1863, art. 23, reprinted in *THE LAWS OF ARMED CONFLICTS* 3 (Schindler & Toman eds., 1988) [hereinafter Lieber Code].

4. Lieber Code, *supra* note 3, arts. 16 & 71.

5. For example, the rule requiring the giving of quarter to those who surrendered or were *hors de combat* was probably respected by a soldier who took his reputation and honor seriously, whether the opposing side fully respected the rule or not.

6. Lieber Code, *supra* note 3, art. 24.

7. For a description of the negotiating history, see Kalshoven, *The Soldier and His Golf Clubs*, in *STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET* 369, 375 (Swinarski ed., 1984). The British delegate to



the 1899 Hague Conference argued that "savages" did not stop when shot, as "civilized" soldiers did.

8. E.g., Convention Respecting the Laws and Customs of War on Land, Oct. 13, 1907, art. 2, 36 Stat. 2277, 205 Consol. T.S. 277, *reprinted in* Schindler & Toman, *supra* note 3, at 63 [hereinafter Hague IV].

9. Lieber Code, *supra* note 3, art. 60.

10. This problem became an issue after the attack on electrical power stations during the second Gulf War.

11. The difficulty in getting blinding laser weapons prohibited was outlined by this author in *Obstacles to Regulating New Weaponry: Battlefield Laser Weapons*, in ARMED CONFLICT AND THE NEW LAW: EFFECTING COMPLIANCE 107 (Fox and Meyer eds., 1993). A description of efforts to develop the law relating to certain weapons this century and prospects for the future is described in PROKOSCH, *THE TECHNOLOGY OF KILLING* (1995).

12. A number of recent publications describe such developments. See, e.g., NATIONAL RESEARCH COUNCIL, STAR 21: STRATEGIC TECHNOLOGIES FOR THE ARMY OF THE TWENTY-FIRST CENTURY (1992); Gassman, *High Power Microwave: The Silent Threat*, 4 ARMADA INTERNATIONAL 4 (1997); Cassidy, *Guess Who's the Enemy*, THE PROGRESSIVE, January 1996, at 22-24; RF Weapons, MICROWAVE NEWS, January/February 1996.

13. Protocol IV on Blinding Laser Weapons, Oct. 13, 1995, 35 I.L.M. 1218 (1996), annexed to the Convention on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 19 I.L.M. 1524 (1980) [hereinafter Certain Conventional Weapons Convention]. The Protocol is reprinted at Doswald-Beck, *New Protocol on Blinding Laser Weapons*, INT'L REV. RED CROSS, No. 312, 1996, at annex.

14. See, e.g., Barnaby, *Civil Science Could Drive Tomorrow's Nukes*, 1 JANE'S INT'L DEF. REV. 61 (1997).

15. A series of articles on the Biological Weapons Convention and present negotiation for strengthening its implementation have been published in the INT'L REV. RED CROSS, No. 318, 1997, at 251-307.

16. Recent literature on this subject includes DANDO, *A NEW FORM OF WARFARE: THE RISE IN NON-LETHAL WEAPONS* (1996); LEWER & SCHOFIELD, *NON-LETHAL WEAPONS: A FATAL ATTRACTION?* (1997).

17. The International Court of Justice in its advisory opinion on nuclear weapons confirmed that these rules mean that certain weapons are illegal as a result of these rules whether there is a specific treaty prohibiting them or not. *Legality of the Threat or Use of Nuclear Weapons*, General List No. 95 (Advisory Opinion of the International Court of Justice, July 8, 1996), paras. 78-79, 35 I.L.M. 809 (1996) [hereinafter Nuclear Weapons].

18. This point will be returned to below in the context of the influence of human rights law.

19. In this regard, see, for example, Hampson, *Fighting by the Rules: Instructing the Armed Forces in Humanitarian Law*, INT'L REV. RED CROSS, No. 269, 1989, at 111; Begines, *The American Military and the Western Idea*, MIL. REV., March 1992, at 39.

20. Particular efforts to improve this situation have been made by the ICRC over the last ten years, and mention should also be made of the courses organized by the International Institute of Humanitarian Law. Ideally, such courses ought not to need to provide basic teaching of the law but rather an exchange of views on implementation, trends, etc.

21. Although there have been some war crimes trials, these have been the exception rather than the rule. The Nuremberg and Tokyo trials are still seen by many as "victors' justice;" the Yugoslav and Rwanda tribunals are recent and rare examples. The ICRC's Advisory Service is

presently making major efforts to persuade States to implement in their internal legislation universal jurisdiction for war crimes. However, it is unfortunately noteworthy that most States were not keen to discuss the issue of national repression of war crimes during the first periodic meeting of States (to be held by Switzerland in January 1998). Such periodic meetings to discuss general problems in the implementation of international humanitarian law were formally accepted by the 26th International Conference of the Red Cross and Red Crescent, December 1995, Resolution 1.

22. Draft as it appeared at the working session of the preparatory committee, August 1997, U.N. Doc. A/AC.249/1997/WG.3/CRP.1/Rev.1, draft art. 23 para. 3.

23. *Id.*, draft art. 21 *bis*, para. 1.

24. For a comparative analysis of both areas of law, see, for example, Doswald-Beck & Vité, *International Humanitarian Law and Human Rights Law*, INT'L REV. RED CROSS, No. 293, 1993, at 94.

25. U.N. CHARTER art. 1(3).

26. Common Article 3 of the Geneva Conventions.

27. A direct reference to human rights law was made in the preamble to this resolution in terms which reflected the preoccupation of much of the international community at the time:

Noting also that minority racist or colonial régimes which refuse to comply with the . . . principles of the Universal Declaration of Human Rights frequently resort to executions and inhuman treatment of those who struggle against such régimes and considering that such persons should be protected against inhuman or brutal treatment.

The resolution was adopted by a vote of 67-0, with two abstentions. This resolution, and two subsequent ones adopted by the General Assembly in 1968 and 1979 (Resolutions 2444 and 2675 respectively), ultimately led to the negotiation and conclusion of the two Additional Protocols of 1977 to the Geneva Conventions.

28. Article 6, which is very similar to Article 6 of the 1950 European Convention on Human Rights and Fundamental Freedoms, Article 14 of the United Nations Covenant on Civil and Political Rights of 1966, and Article 8 of the American Convention on Human Rights of 1969.

29. Recommendations of UN rapporteurs indicate that certain judicial guarantees should be non-derogable. Reports by Ms. Questiaux, U.N. Doc. E/CN.4/Sub.2/1982/15, and Messrs. Chernichenko and Treat, U.N. Doc. E/CN.4/Sub.2/1990/34. The ICRC was not as careful prior to the 1970s as it is now to ensure that human rights treaties give at least as much protection as humanitarian law ones.

30. E.g., its discussions and work on reparations for violations of human rights and humanitarian law, U.N. Doc. E/CN.4/Sub.2/1996/17; impunity, U.N. Doc. E/CN.4/Sub.2/1996/18; internally displaced persons, U.N. Doc. E/CN.4/1997/43; etc.

31. Reports on the Question of the Use of Mercenaries as a Means of Violating Human Rights, U.N. Doc. Nos: E/CN.4/1997/24, E/CN.4/1996/27, E/CN.4/1995/29, E/CN.4/1994/23, E/CN.4/1993/18.

32. Report on the Situation of Systematic Rape, Sexual Slavery, and Slavery-like Practices during Periods of Armed Conflict, U.N. Doc. E/CN.4/Sub.2/1996/26.

33. Mr. Felix Ermacora, first appointed by the Economic and Social Council in 1984 by Resolution 1984/37. The mandate was subsequently renewed yearly. A new rapporteur, Mr. Choong-Hyun Paik, was appointed in April 1995. Many of the elements in these reports relate directly to the armed conflict situation in that country.

34. Report on the Situation of Human Rights in the Territory of the Former Yugoslavia, U.N. Docs. A/47/666; E/CN.4/1992/S-19; E/CN.4/1996/6; E/CN.4/1996/9; E/CN.4/1997/8.



35. Situation of Human Rights in Occupied Kuwait, U.N. Doc. E/CN.4/1992/26.
36. Report on the Situation of Human Rights in Rwanda, U.N. Doc. E/CN.4/1995/12.
37. Report of the Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts, U.N. Doc. No. E/CN.4/1997/96.
38. Two notable human rights non-governmental organizations have begun to report on the respect or otherwise of international humanitarian law. See, e.g., MIDDLE EAST WATCH, NEEDLESS DEATHS IN THE GULF WAR (1991), and AMNESTY INTERNATIONAL, UNLAWFUL KILLINGS DURING OPERATION "GRAPES OF WRATH" (1996).
39. Although, due to the consensus rule, Protocol III of the Convention on Certain Conventional Weapons [19 I.L.M. 1394 (1980)] does not actually contain such a prohibition, there can be no doubt that the political sensitivity of incendiary weapons has in practice virtually eliminated their use against personnel.
40. During the 25th International Conference of the Red Cross.
41. Most notably, the Human Rights Watch Arms Project. For a description of the development of this treaty, see Doswald-Beck, *supra* note 13, at 272.
42. G.A. Res. 51/45S, Dec. 10, 1996.
43. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 (1997) [hereinafter Mine Convention], and draft U.N.GA 1st Committee Res. A/C. 1/52/L.1, Oct. 22, 1997, inviting all States to sign and then ratify this Convention.
44. An important publication on this subject is HUMAN RIGHTS WATCH ARMS PROJECT & PHYSICIANS FOR HUMAN RIGHTS, LANDMINES: A DEADLY LEGACY (1993).
45. Which hired Jody Williams, the corecipient of the Nobel Peace Prize, for the purpose. The organization published an in-depth study in 1995 on the effects of mines. ROBERTS & WILLIAMS, AFTER THE GUNS FALL SILENT: THE ENDURING LEGACY OF LANDMINES (1995). The idea for such a study arose as one of the conclusions of a seminar on the subject of antipersonnel landmines hosted by the ICRC in Montreux in 1993.
46. The ICRC was particularly active in this regard, with the considerable help of other components of the Red Cross and Red Crescent Movement. It made more use of the media and the press than for any other issue.
47. See, for example, the conclusions of the ICRC-mandated military study ANTI-PERSONNEL LANDMINES: FRIEND OR FOE (1996), and the open letter to the same effect signed by 15 retired United States generals (including Norman Schwarzkopf) to President William Clinton in April 1996.
48. The attacks on the Ameriyya air raid shelter by U.S. forces during the second Gulf War and on the Qana UN compound by Israeli forces are commonly attributed to mistakes.
49. Coupland & Samnegaard, Development and Transfer of Conventional Weapons: The Implications for Civilian Casualties (unpublished manuscript on file with author).
50. Anti-personnel Landmines, *supra* note 47, concl. 3 (for the difficulties).
51. "With this distance between the user and the victim, the user feels less responsible for his or her actions." GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY (1995).
52. Hague Conventions VI, VII, VIII, IX, X, XI, XII, *reprinted in* Schindler & Toman, *supra* note 3, at 719, 797, 803, 881, 331, 819, & 825 respectively, <http://www.tufts.edu/departments/fletcher/multi/warfare.html>. The London Declaration of 1909 did not come into force, and the London Procès-Verbal of 1936 only dealt, and rather imperfectly, with one aspect of submarine warfare.



53. Judgment of the International Military Tribunal for the Trial of German War Criminals 109 (London CMD 6946, 1946).

54. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (with explanation) (Doswald-Beck ed., 1995).

55. *Id.*, paras. 136–140 & pp. 206–210.

56. This is not always the case. For example, the lack of such personal hatred helped the implementation of the law in the South Atlantic conflict of 1982 between the United Kingdom and Argentina.

57. A general analysis of combat stress disorder and its effects was made in the context of the Second Group of Experts convened by the ICRC in November 1990, one of the four meetings of experts relating to battlefield laser weapons. See *Blinding Weapons, Reports of the Meetings of Experts Convened by the International Committee of the Red Cross on Battlefield Laser Weapons* (Doswald-Beck ed., 1993), in particular the report by Dr. A. Shalev, *Emotional Health Problems Arising from Battle Situations and Injuries Suffered in Battle*, *id.* at 272–6.

58. A thorough analysis of stress factors on soldiers and measures to be taken to reduce excessive and debilitating combat stress has been made by a military officer: DINTER, *HERO OR COWARD: PRESSURES FACING THE SOLDIER IN BATTLE* (1985).

59. *Blinding Weapons*, *supra* note 57, at 281, 287–9.

60. *Id.* See also DINTER, *supra* note 58, at 73.

61. ICAO Doc. C-W P/8708; Report of July 28, 1988 from Rear Admiral Fogarty, USN, to the Commander in Chief, U.S. Central Command, endorsed on 5 August 1988 by the Commander in Chief and on 18 August 1988 by the Chairman of the Joint Chiefs of Staff, at E-59, 60 & 62.

62. For a description of the negotiation, see Junod, *Additional Protocol II: History and Scope*, 33 AM. U. L. REV. 29 (1983).

63. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, arts. 3c, 11, 14, & 15, U.N. Doc. A/32/144, Annex II (1977), 16 I.L.M. 1942 (1977), *reprinted in* Schindler & Toman, *supra* note 3, at 621.

64. Study requested by the 26th International Conference of the Red Cross and Red Crescent, Resolution 1, which approved the recommendations of the Meeting of the Intergovernmental Group of Experts for the Protection of War Victims, January 1995, *reprinted in* INT'L REV. RED CROSS, No. 310, 1996, at 83–84.

65. Colombian Proposal of Sept. 3, 1997, Doc. APL/CW.46. Another complication was that the conference did not want any language that could give the impression that the scope of application was other than in all circumstances.

66. Closing session of the Oslo Conference, 18 September 1997.

67. Working Group on Involvement of Children in Armed Conflict, 3d sess., Commission on Human Rights, March 13, 1997.

68. See Report of the Working Group, *supra* note 37, at para. 115.

69. *Id.*, annex.

70. *Id.*

71. Although there are references to duties in the 1948 American Declaration of the Rights and Duties of Man, O.A.S. Off. Rec. OEA/Ser. L/V/I.4 Rev. (1965), and the 1982 African Charter on Human and People's Rights (Banjul Charter), 21 I.L.M. 58 (1982).

72. This point was made forcefully by the delegate of the government of the Netherlands.

73. Statute for the International Tribunal for Rwanda 35 I.L.M. 1598 (1990).

74. For example, Afghan rebel groups were successfully persuaded not to kill enemy soldiers when captured, and quite a major change in the behavior of rebel forces in El Salvador was also achieved. See, e.g., HAMMER, *DEVELOPING A HUMANITARIAN AWARENESS: A CASE-STUDY OF EL SALVADOR IN THE 1980'S*, (Henry Dunant Institute, 1987). However, it does not always work. For example, a rebel group in Colombia specifically declined to apply Common Article 3, because it wished to continue to take hostages.

75. Resolution 1, *supra* note 61, at 88.

76. In particular, in art. 47 of Additional Protocol I. Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 47, U.N. Doc. A/32/144, 16 I.L.M. 1391.

77. See, e.g., *Broker of War and Death*, MAIL AND GUARDIAN, Feb. 28–Mar. 6 1997, at 12. Executive Outcome states that it only works for recognized governments.

78. See, e.g., *Mercenaries Eye Sierra Leone*, GLOBE AND MAIL, Aug. 1, 1997.

79. For a description of these kinds of activities, see BALENCIE & DE LA GRANGE, 1 *MONDES REBELLES: ACTEURS, CONFLITS ET VIOLENCES POLITIQUES* (Amériques, Afrique) (1996). The criminal and financial activities of Colombian rebels, and measures resorted to by private companies, are described on page 105.

80. During his statement on 18 December 1996 to the Permanent Missions of States in Geneva, the President of the ICRC alluded to this difficulty. He questioned whether one could speak directly of violations of international humanitarian law or whether one had rather to speak more generally of violations of “values” of the international community. He specifically mentioned the need to find a way to assure, in practice, respect toward medical personnel, hospitals, and the protective emblem. Statement in the compilation of public statements of the ICRC relating to its activities in Chechnya and Northern Caucasus, July 1993–10 January 1997, LG 1997/013.

81. The situation is even more acute when State structures have broken down. The 26th International Conference of the Red Cross and Red Crescent asked the ICRC to prepare a report on this problem, and the subject was briefly considered during the first Periodical Meeting on international humanitarian law that was convened by the Swiss government in January 1998. The preparatory document on this subject was prepared by the ICRC.

82. See, e.g., Tittmore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT'L L. 61, 89–90 (1997). See also CANADIAN GOVERNMENT, *DISHONOURD LEGACY: THE LESSONS OF THE SOMALIA AFFAIR* (1997).

83. *Id.* at 80.

84. Peacekeeping forces were first involved in combat in the Congo, but since then problems have occurred elsewhere, particularly when their mandate and instructions were not totally clear. For a short history of the various peacekeeping operations, see Liu, *The Use of Force in U.N. Peacekeeping Operations: A Historical Perspective* (June 20, 1996) (paper delivered at the International Peace Academy in Vienna, July 1996). At present, there are sixteen UN peacekeeping operations active around the world (see [http://www.un.org/Depts/DPKO/c\\_miss.htm](http://www.un.org/Depts/DPKO/c_miss.htm)).

85. For more information and references to further literature on this issue, see Tittmore, *supra* note 81, at 87–89.

86. Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects, Model Agreement Between the United Nations and Member States Contributing Personnel and Equipment to United Nations Operations, Report of the Secretary-General, para. 28, U.N. Doc. A/46/185 (1991).



87. Symposium on Humanitarian Action and Peace-keeping Operations, June 1994; Meeting of Experts on the Applicability of International Humanitarian Law to United Nations Forces, March 1995 (for expert meetings).

88. The experts included governmental, academic and UN personnel, all acting in their personal capacities.

89. S.C. Res. 1101 (1997).

90. The issue of how to use its own peacekeeping forces has also arisen in the context of the Organization for Security and Cooperation in Europe. Such forces have not yet been used, although there was a long negotiation in 1993–1994 about their possible use in Nagorno-Karabach. The precise nature of such forces has not yet been established, and therefore they could face the same kind of difficulty as do those of the United Nations. For a description of how such operations could work, see GHEBALI, *L'OSCE DANS L'EUROPE POST-COMMUNISTE*, 1990–1996, 243–4 (1996).

91. Consisting of U.S., British, French, and Italian contingents. See Nelson, *Multinational Peacekeeping in the Middle East and the United Nations Model*, INTL AFF., 1984/5, at 67, 71–80.

92. The ECOWAS Monitoring Group was set up by decision of a summit of African States that met in Banjul. See BALENCIE & DE LA GRANGE, *supra* note 79, at 284.

93. The Treaty's full title: Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts.

94. In particular, it gave to the presidency of the European Union in September 1996 a proposal of wording. For Article J.4 it suggested the following: "All decisions relating to a common defence policy and actions of the Union which have defence implications shall be in conformity with international humanitarian law and help ensure its respect."

95. For a more extensive look at implementation mechanisms, see Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INTL L. 11 (1995).

96. Created on the recommendation of the Meeting of the Intergovernmental Group of Experts for the Protection of War Victims, *supra* note 64, at 84.

97. For a general description of its activities, see National Implementation of International Humanitarian Law: Annual Report 1966, Advisory Service on International Humanitarian Law.

98. A report of a meeting of experts on this issue was published as Committees or Other National Bodies for International Humanitarian Law (Pellandini ed., 1997).

99. A meeting of experts was convened by the Advisory Service in September 1997 to discuss this issue in the context of civil law systems, and another is due to be held in 1998 for the context of common law systems.

100. By Special Rapporteur Mr. Theo Van Boven. See note 30 *supra*.

101. For example, cases presently being heard by the Tokyo district court relating to ill treatment of Dutch prisoners of war and the abuse of so-called "comfort women." Professor Frits Kalshoven was asked to appear as an expert witness for these cases in order to render his opinion as to whether victims of violations were entitled to reparations by virtue of Article 3 of Hague Convention IV of 1907. His opinion was in the affirmative. Information given by Prof. Kalshoven during the Fourth Hague Joint Conference of the American Society of International Law and the Nederlandse Vereniging voor Internationaal Recht, July 3, 1997.

102. In particular, the International Fact-Finding Commission, established under Article 90 of Additional Protocol I, but which has not yet been used.

103. Commission of Experts established pursuant to S.C. Res. 780 (1992).

104. Report of the Independent Commission of Experts established in accordance with S.C. Res. 935 (1994), U.N. Doc.S/1994/1125.



105. Examples given in notes 33–36 *supra*.

106. During the Meeting of the Intergovernmental Group of Experts for the Protection of War Victims referred to in note 64 *supra*. The proposal was made by the Netherlands and supported by several States but did not command sufficient support to be included in the meeting's recommendations.

107. A variety of factors are responsible for the mixed results. These were thoroughly analyzed in a report entitled "A Comparison of Self-Evaluating State Reporting Systems" prepared by E. Kornblum for the meeting. Reprinted in INT'L REV. RED CROSS, Nos. 304 and 305, 1995, at 39 and 134 respectively. The whole text is also available as an offprint.

108. Article 36 of Protocol I obliges States to make such an evaluation, but this provision is only an articulation of what States are obviously bound to do in a *bona fide* implementation of humanitarian law.

109. Meeting of the First Working Group of Experts, *supra* note 57, at 95–173.

110. Bullets that exploded on contact with the human body, banned by the St. Petersburg Declaration of 1868.

111. This was done to some degree in the context of the Second Group of Experts on Battlefield Laser Weapons, *supra* note 57, at 179–183, 244–257, and 289–292.

112. As a result of expert meetings, the ICRC drafted a document entitled "Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflicts," 1994, submitted pursuant to G.A. Res. A/RES/48/30, Dec. 9, 1993. However, these guidelines merely indicated the present content of humanitarian law having the function of protecting the environment; the problem of how to make the scientific evaluation still remains. It is also worth noting the Advisory Opinion of the International Court of Justice, which indicated the general requirements of States in this regard under customary law. Nuclear Weapons, *supra* note 17, paras. 29–30.

113. On the potential problems of serious water shortages, see, e.g., Starr, *Water Wars*, FOREIGN POL'Y, Spring 1991, at 17; Remans, *Water and War*, HUMANITÄRES VÖLKERRECHT: INFORMATIONSSCHRIFTEN 4 (1995).

114. Nuclear Weapons, *supra* note 17, para. 105 F.

115. The 1950 European Convention on Human Rights; the 1969 American Convention on Human Rights; 1966 Optional Protocol to the U.N. Covenant on Civil and Political Rights (on individual petition).

116. Particularly pertinent cases are those of Ergi against Turkey before the Commission, and Aydin against Turkey before the Court. The case of Ergi is especially interesting as it concerns actions by security forces against Kurdish groups resulting in deaths of civilians. The Commission found a violation of Article 2 (the right to life), because the security forces did not take enough care in their operations to avoid civilians and because they did not thoroughly investigate the death which was the subject of this case: *Muharrem Ergi v. Turkey*, Report of the Commission, May 20, 1997, paras. 144–156. The case of Aydin concerned the ill treatment of a girl detained by security forces in the context of "serious disturbances" between members of the security forces and members of the PKK which, according to the government, had claimed the lives of 4,036 civilians and 3,884 members of the security forces. The Court found that there was a violation of Article 3 and that the treatment she suffered, including rape, amounted to torture. *Aydin v. Turkey*, Judgment of the European Court of Human Rights, Sept. 25, 1997, paras. 14 & 80–87. Another interesting case concerned the situation in northern Cyprus, where the court found a violation to the right to property and the Turkish government responsible because of its military occupation of the area. *Loizidou v. Turkey*, Judgment of the European Court of Human Rights, Dec. 18, 1996, paras. 16–23 & 41–64.

117. Protecting Powers, formal complaints, investigations by the U.N., etc. The International Fact-Finding Commission would not be a governmental mechanism as such, for its members act in their personal capacities. Additional Protocol I, *supra* note 75, art. 90(1)(c).

118. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 126, 6 U.S.T. 3316, 75 U.N.T.S. 135.

119. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 143, 6 U.S.T. 3516, 75 U.N.T.S. 287.

120. Third Geneva Convention, *supra* note 118, art. 123, and Fourth Geneva Convention, *supra* note 119, art. 140.

121. Statutes of the International Red Cross and Red Crescent Movement, as updated at the Twenty-fifth International Conference of the Red Cross (at which all signatories participate), art. 5, para. 2.g, Oct. 1995 (for the ICRC role in developing international law).

122. Mine Convention, *supra* note 43, 8th pmbl. para.

123. This author was present throughout the negotiations on the wording of this preambular paragraph.

124. For example, their active observer status at the UN Human Rights Commission.





# IV

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## The Development of the Law of Armed Conflict through the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia

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William Fenrick

THE INTERNATIONAL CRIMINAL TRIBUNAL for the former Yugoslavia (ICTY) was established by Security Council Resolution 827 of 25 May 1993.<sup>1</sup> Article 1 of the ICTY Statute states: "The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute." The provisions that follow in the ICTY Statute give the Tribunal specific subject-matter jurisdiction over grave breaches of the Geneva Conventions of 1949 (Article 2), violations of the laws or customs of war (Article 3), genocide (Article 4), and crimes against humanity (Article 5).

There is little doubt that the decisions and practice of the ICTY and of its sister tribunal, the International Tribunal for Rwanda (ITR)<sup>2</sup> will have a significant impact on the development of the law of armed conflict. Judicial decisions are a subsidiary means for the determination of rules of international

law, not a source of law equivalent to treaties, custom or general principles of law. Further, there is no rule of precedent in international law as such. The decisions and practice of the ICTY, if they are to have a positive impact on the development of the law of armed conflict, must persuade external decision makers such as foreign ministry officials, officials in international organizations, other judges, military officers, and academic critics of their relevance and utility. Judicial decisions affect the development of the law of armed conflict insofar as they address legal lacunae (treaty negotiators can and do accept gaps in the law—judges cannot), as they add flesh to the bare bones of treaty provisions or to skeletal legal concepts such as military necessity or proportionality, and as they identify and give legitimacy to new legal developments, such as emergent custom.

Applying its own statute, some of the Tribunal's decisions will be statute dependent and of limited relevance to the general development of the law of armed conflict.<sup>3</sup> The ICTY has developed its own approach to procedural and evidentiary issues, topics essentially unaddressed in the law of armed conflict. Further, the Tribunal is concerned exclusively with offenses occurring in the territory of the former Yugoslavia. At times, one might regard the various factual scenarios as having been drafted for an exceptionally difficult Jessup moot court competition. One is, however, constantly reminded of the bitter reality of devastation and death that compelled the creation of the Tribunal. The complexity of the situation in the territory of the former Yugoslavia has compelled the Tribunal to devote substantial parts of most of its decisions to determining the nature of the conflict and the content of the body of applicable law. The treaty-based law of armed conflict has been drafted by and agreed to by representatives of States. The applicability of this body of law is dependent upon the classification of a particular conflict. A relatively elaborate body of law applies during international conflicts; a much more skeletal body of law applies to internal conflicts.

This "two box" approach to the law is rooted in the reluctance of many states to accept what they perceive to be interference in their internal affairs. One might query why States would wish to do worse things to their own citizens in an internal conflict than to foreigners in an international conflict. Bearing in mind the complexity of the conflict(s) in the territory of the former Yugoslavia and the similar complexity of many other contemporary conflicts, one might also query the continuing utility of the two-box approach. The analytical contortions of the ICTY judges on the subject both demonstrate the need for a unified approach and suggest how such an approach might evolve.

As of 31 December 1997, the ICTY has confirmed twenty public indictments naming seventy-four indictees,<sup>4</sup> including three Muslims, fifteen Croats and fifty-six Serbs. It had nineteen indictees in custody, including three Muslims, four Serbs and twelve Croats. One trial, that of Dusko Tadić, a Bosnian Serb, had been completed, and the conviction was being appealed. One indictee, Drazen Erdemović, a Bosnian Croat fighting on the Bosnian Serb side, submitted a guilty plea but then appealed his sentence. Two other trials were ongoing—that of Timofil Blaskić, a Bosnian Croat, and the joint trial of Hazim Delić, Esad Landzo, Zdravko Mucić, and Zejnil Delalić, three Bosnian Muslims and one Bosnian Croat. In addition, two trials, those of Zlatko Aleksovski, a Bosnian Croat, and Zlavko Dokmanović, a Croatian Serb, were scheduled to start in January 1998, with several others to follow. The Office of the Prosecutor (OTP) of the ICTY has made a conscientious effort to devote resources to investigate offenses allegedly committed by Croats, Muslims, and Serbs in an evenhanded fashion. A glance at the list of indictees indicates that to date: (a) a substantial majority of the indictees are Serbs (usually from Bosnia), a significant number of the indictees are Croats (also usually from Bosnia), and a small number of the indictees are Bosnian Muslims; and (b) all of the Muslim indictees and almost all of the Croat indictees, but very few of the Serb indictees, are now in custody.

Two comments about the approach of the OTP to investigations and indictments are necessary. First, the vast number of alleged offenses committed in the territory of the former Yugoslavia and the limited resources of the OTP mandate a selective rather than a comprehensive approach. The basic preference has been to conduct investigations related to persons of particular importance, to particularly atrocious incidents, or to persons alleged to be responsible for particularly heinous acts. Inasmuch as investigations are continuing, the fact that certain persons have not yet been indicted is not necessarily significant. The availability of evidence or of an accused has occasionally affected decisions to conduct investigations. The OTP conducts its own investigations; it cannot and does not rely on untested information provided by others. Second, because of the complexity of the conflict and the fact that the ICTY Statute does not address the issue of included offenses, indictments have tended to include three types of charges for each alleged incident: an Article 2 (grave breaches) charge if the prosecution can establish the conflict is international, an Article 3 (violation of the laws or customs of war) charge if the conflict is determined to be internal, and an Article 5 (crimes against humanity) charge if the prosecution can establish that the offense



occurred within the context of a widespread or systematic attack against the civilian population.

To date, the ICTY has contributed to the development of the law of armed conflict by its decisions related to the application of the grave breach provisions of the Geneva Conventions of 1949; to the scope of the concept of violations of the laws or customs of war, particularly in internal conflicts; to the meaning and scope of crimes against humanity; to the scope of individual criminal responsibility, including the doctrine of command responsibility; and to potential defenses, including duress and the doctrine of reprisals. This article discusses each of these issues in turn. It will conclude with an assessment of probable future developments.

### **Application of the Grave Breach Provisions**

Article 2 of the ICTY Statute gives the Tribunal the power to prosecute persons committing or ordering to be committed grave breaches of the 1949 Geneva Conventions. Common Article 2 of the Geneva Conventions indicates that the Conventions apply in their entirety to all armed conflicts involving one or more High Contracting Parties on each side; to all cases of total or partial occupation of the territory of a High Contracting Party by the forces of another High Contracting Party; and to armed conflicts with Powers which are not parties to the Conventions if these Powers accept and apply the provisions thereof. A reasonable argument can be made that the grave breach provisions are part of customary law and apply to all international conflicts.<sup>5</sup> In any event, the Geneva Conventions applied throughout the territory of the former Yugoslavia during the period of conflict as a matter of treaty obligation.<sup>6</sup> It should also be noted that Common Article 3 of the Geneva Conventions, which applies to non-international conflicts, encourages parties to such conflicts to enter into special agreements to bring into force all or part of the other provisions of the Conventions. All of the parties to the conflict have entered into a web of special agreements pursuant to Common Article 3 or to other general principles of humanitarian law.<sup>7</sup>

Unfortunately, simply stating that the sovereign entities in the territory of the former Yugoslavia were bound by the Geneva Conventions as a matter of treaty or custom does not resolve the issue of whether or not the grave breach provisions were relevant. At various times: (a) the Socialist Federal Republic of Yugoslavia (SFRY), which was succeeded on 29 April 1992 by the Federal Republic of Yugoslavia (FRY), was engaged in armed conflict against one or more of Slovenia, Croatia, and Bosnia; (b) Croatia was engaged in armed

conflict against the SFRY, the so-called Republic of Serbian Krajina (RSK), the FRY, and Bosnia; (c) Bosnia was engaged in armed conflict against the SFRY, the FRY, the Republika Srpska (RS), Croatia, the HVO (the Bosnian-Croat entity), and the Bosnian Muslim faction controlled by Fikret Abdic; and (d) Slovenia was engaged in armed conflict with the SFRY. One is tempted to cut the Gordian knot and simply argue that all the fighting that occurred in the territory of the former Yugoslavia between 1991 and 1995 was part of one large international conflict. It is difficult, however, to fit all the fighting into an international armed conflict framework. As one example, it is difficult to see how the fighting between the Bosnian government and the Abdic faction can be regarded as part of an international conflict.

The decision on the *Defence Motion for Interlocutory Appeal on Jurisdiction* (hereinafter *Tadić Jurisdiction Decision*) rendered on 2 October 1995 gave the Appeals Chamber a first opportunity to address the conflict classification issue.<sup>8</sup> The offenses with which Tadić was charged occurred in Bosnia in 1992; they involved a Bosnian Serb perpetrator and Bosnian Croat or Muslim victims.

At the trial level, the defense argued that the conflict in issue was not international and that there were no Common Article 3 agreements bringing the grave breach provisions into effect.<sup>9</sup> The prosecutor argued that for a variety of reasons the conflict was international and, to the extent the conflict had internal aspects, the grave breach provisions applied as a result of relevant Common Article 3 agreements.<sup>10</sup> The United States, in an *amicus* brief, argued that the events in the former Yugoslavia should be regarded as parts of a single international conflict and that violations of Common Article 3 could be prosecuted under the grave breach provisions of the Geneva Conventions.<sup>11</sup> On appeal, the prosecution also argued that the Security Council had determined that the conflict in the former Yugoslavia was international and that this determination should be given full effect.<sup>12</sup>

The Appeals Chamber declined to decide on the nature of the conflict, leaving the issue to be resolved as a matter of mixed fact and law by the Trial Chamber. It did indicate in its decision that classification was a complex issue and that the Security Council was also aware of this complexity.

[W]e conclude that the conflicts in the former Yugoslavia have both internal and international aspects, that the members of the Security Council clearly had both aspects of the conflicts in mind when they adopted the Statute of the International Tribunal, and that they intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in either context.<sup>13</sup>



The Appeals Chamber went on to adopt a relatively conservative approach to Article 2 of the ICTY Statute, deciding that “in the present state of development of the law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts.”<sup>14</sup> The majority observed further:

Since it cannot be contended that the Bosnian Serbs constitute a State, arguably the classification just referred to would be based on the implicit assumption that the Bosnian Serbs are acting not as a rebellious entity but as organs or agents of another State, The Federal Republic of Yugoslavia (Serbia-Montenegro). As a consequence, serious infringements of international humanitarian law committed by the government army of Bosnia-Herzegovina against Bosnian Serbian civilians in their power would not be regarded as “grave breaches,” because such civilians, having the nationality of Bosnia-Herzegovina, would not be regarded as “protected persons” under Article 4, paragraph 1 of Geneva Convention IV. By contrast, atrocities committed by Bosnian Serbs against Bosnian civilians in their hands would be regarded as “grave breaches,” because such civilians would be “protected persons” under the Convention, in that the Bosnian Serbs would be acting as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro) of which the Bosnians would not possess the nationality. This would be, of course, an absurd outcome, in that it would place the Bosnian Serbs at a substantial legal disadvantage *vis-à-vis* the central authorities of Bosnia-Herzegovina.<sup>15</sup>

This particular observation, although unnecessary to the decision and of debatable accuracy, has had a substantial impact on consideration of the issue by the various trial chambers in subsequent cases.

Although the defense would appear to have conceded the point and the prosecution argued in support of it, the Chamber was unwilling to consider the possibility of prosecuting under Article 2 of the Statute for grave breaches occurring in an internal conflict if appropriate Common Article 3 agreements had been concluded. It did, however, envisage the possibility of such prosecution under Article 3 of the Statute.<sup>16</sup> Implicitly, the Chamber decided that it was not possible to prosecute violations of Common Article 3 under the grave breach provisions of the Geneva Conventions. The relatively cautious approach to interpretation of Article 2 of the ICTY Statute taken by the majority can be contrasted with a much more progressive approach adopted in a separate opinion by Judge Abi-Saab. He was of the view that the Tribunal should assume jurisdiction under Article 2 for acts committed in internal conflicts on the basis of either a new interpretation of the Geneva Conventions or the establishment of a new customary rule ancillary to the Conventions.



As a matter of treaty interpretation—and assuming that the traditional reading of “grave breaches” has been correct—it can be said that this new normative substance has led to a new interpretation of the Conventions as a result of the “subsequent practice” and *opinio juris* of the States parties: a teleological interpretation of the Conventions in the light of their object and purpose of the effect of including internal conflicts within the regime of “grave breaches.” The other possible rendering of the significance of the new normative substance is to consider it as establishing a new customary rule ancillary to the Conventions, whereby the regime of “grave breaches” is extended to internal conflicts. But the first seems to me as the better approach. And under either, Article 2 of the Statute applies—the same as Article 3, 4 and 5—in both international and internal conflicts.<sup>17</sup>

The majority judgment in the *Tadić Jurisdiction Decision* set the standard for consideration of the conflict classification issue by the Trial Chambers.

The major decisions at the trial chamber level addressing the classification issue to date have been the Rule 61 proceeding<sup>18</sup> concerning Ivica Rajič<sup>19</sup> and the *Tadić Trial Decision*.<sup>20</sup> These decisions have tended to focus on three related questions: (a) did an international conflict exist when the offenses were committed? (b) was the accused linked in an appropriate fashion to one side of the international conflict? and (c) were the victims in the hands of a party to the conflict or occupying power of which they were not nationals? Most of the victims are civilians, and Article 4 of the Civilians Convention states in part: “Persons protected are those who . . . find themselves . . . in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” In the absence of any other relevant international decisions, and for better or worse, particular heed has been paid by the trial chambers to the *Nicaragua* decision of the International Court of Justice when considering conflict classification.<sup>21</sup> The *Nicaragua* decision was concerned with State responsibility for violations of international humanitarian law, not with individual criminal responsibility. Further, it was concerned with the peculiar facts of the U.S.-supported “contra” struggle in Nicaragua, and these facts are not necessarily similar to the facts arising in the territory of the former Yugoslavia.

In the Rajič Rule 61 proceeding, a trial chamber consisting of Judges McDonald, Sidhwa, and Vohrah reviewed and reconfirmed an indictment against Ivica Rajič alleging that Bosnian Croat forces under his command attacked the Bosnian village of Stupni Do on 23 October 1993 and committed several offenses for which Rajič was responsible, including the grave breach of wilful killing recognized by Article 2(a) of the ICTY Statute. Bearing in mind the *Tadić Jurisdiction Decision*, the trial chamber was of the view that it was

necessary to establish an undefined quantum of third-State (Croatian) involvement in the clashes between Bosnian government and Bosnian Croat (HVO) forces to convert an internal conflict into an international conflict. The prosecution advanced two theories: (a) the conflict was international because of the direct military involvement of Croatian forces engaged in combat with Bosnian forces in Bosnia; and (b) the conflict was international because, in the hostilities between Bosnia and the Bosnian Croats, the Bosnian Croats were closely related to and controlled by Croatia and its armed forces. In brief:

13. The Chamber finds that, for purposes of the application of the grave breaches provisions of Geneva Convention IV, the significant and continuous military action by the armed forces of Croatia in support of the Bosnian Croats against the forces of the Bosnian Government on the territory of the latter was sufficient to convert the domestic conflict between the Bosnian Croats and the Bosnian Government into an international one. The evidence submitted by the Prosecutor provides reasonable grounds to believe that between 5,000 to 7,000 members of the Croatian Army as well as some members of the Croatian Armed Forces ("HOS"), were present in the territory of Bosnia and were involved, both directly and through their relations with HB and the HVO, in clashes with Bosnian Government forces in central and southern Bosnia.

The Chamber indicated, however, that the existence of an international conflict between Bosnia and Croatia during the appropriate period was not enough, by itself, to establish that grave breaches had been committed by Bosnian Croats. It was also essential to establish that Croatia exerted such political and military control over the Bosnian Croats that the latter might be regarded as an agent or extension of Croatia. The Chamber addressed the issue as follows:

25. The Trial Chamber deems it necessary to emphasise that the International Court of Justice in the *Nicaragua* case considered the issue of agency in a very different context from the one before the Trial Chamber in this case. First, the Court's decision in the *Nicaragua* case was a final determination of the United States' responsibility for the acts of the *contras*. In contrast, the instant proceedings are preliminary in nature and may be revised at trial. Second, in the *Nicaragua* case the Court was charged with determining State responsibility for violations of international humanitarian law. It therefore rightly focused on the United States' operational control over the *contras*, holding that the "general control by the [United States] over a force with a high degree of dependency on [the United States]" was not sufficient to establish liability for violations by that force. *Nicaragua*, 1986 I.C.J. Rep. ¶ 115. In contrast, this Chamber is not called upon to determine Croatia's liability for the



acts of the Bosnian Croats. Rather, it is required to decide whether the Bosnian Croats can be regarded as agents of Croatia for establishing subject-matter jurisdiction over discrete acts which are alleged to be violations of the grave breaches provisions of the Geneva Conventions. Specific operational control is therefore not critical to the inquiry. Rather, the Trial Chamber focuses on the general political and military control exercised by Croatia over the Bosnian Croats.

The Chamber then went on to determine whether the Bosnian civilian victims were protected persons in that they were in the hands of a party to the conflicts of which they were not nationals:

37. The Chamber has been presented with considerable evidence that the Bosnian Croats controlled the territory surrounding the village of Stupni Do. . . . Because the Trial Chamber has already held that there are reasonable grounds for believing that Croatia controlled the Bosnian Croats, Croatia may be regarded as being in control of this area. Thus, although the residents of Stupni Do were not directly or physically "in the hands of" Croatia, they can be treated as being constructively "in the hands of" Croatia, a country of which they were not nationals. The Trial Chamber therefore finds that the civilian residents of the village of Stupni Do were—for the purposes of the grave breaches provisions of Geneva Convention IV—protected persons *vis-à-vis* the Bosnian Croats because the latter were controlled by Croatia.

The *Tadić Trial Decision* has the most elaborate discussion of the conflict classification issue to date. The Trial Chamber in this case consisted of Judges McDonald, Vohrah, and Stephen. As indicated earlier, Tadić is a Bosnian Serb who committed offences against Bosnian Muslims or Croats in Bosnia in the summer of 1992. In brief, the majority, consisting of Judges Vohrah and Stephen, held that the Geneva Conventions did apply in Bosnia throughout the period covered by the indictment, because of an ongoing international armed conflict between Bosnia and the SFRY/FRY.<sup>22</sup> The majority then made two unsubstantiated assertions in a single paragraph: that (a) the armed forces of the Republika Srpska (the VRS) and the RS as a whole were, at least from 19 May 1992 onwards, legal entities distinct from the FRY armed forces (VJ) and from the FRY, and (b) members of the VRS were nationals of Bosnia.<sup>23</sup> May 19, 1992 was significant as the date of the dissolution of the old SFRY national army (the JNA) into two new components, the VRS and the VJ, and the formal withdrawal of the VJ from Bosnia. This was in spite of the majority observation that:



115. The formal withdrawal of the JNA from Bosnia and Herzegovina took place on 19 May 1992; the VRS was in effect a product of the dissolution of the old JNA and the withdrawal of its non-Bosnian elements into Serbia. However, most, if not all, of the commanding officers of units of the old JNA who found themselves stationed with their units in Bosnia and Herzegovina on 18 May 1992, nearly all Serbs, remained in command of those units throughout 1992 and 1993 and did not return to Serbia. This was so whether or not they were in fact in origin Bosnian Serbs. This applied also to most other officers and non-commissioned officers. Although then formally members of the VRS rather than of the former JNA, they continued to receive their salaries from the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) and the pensions of those who in due course retired were paid by that Government. At a briefing of officers concerned with logistics, General Dorde Dukic, then of the VRS but who had, until 18 May 1992, been Chief of Staff of the Technical Administration of the JNA in Belgrade, announced that all the active duty members of the VRS would continue to be paid by the federal government in Belgrade, which would continue to finance the VRS, as it had the JNA, with the same numerical strengths of officers as were registered on 19 May 1992. The weapons and equipment with which the new VRS was armed were those that the units had had when part of the JNA. After 18 May 1992 supplies for the armed forces in Bosnia and Herzegovina continued to come from Serbia.

Relying on its unanalyzed conclusions that the VRS and RS were legally distinct from the VJ and the FRY and that members of the VRS were Bosnian nationals, the majority went on to review the *Nicaragua* case in order to determine the proper rule for applying general principles of international law relating to State responsibility for *de facto* organs or agents to the specific circumstances of rebel forces fighting a seemingly internal conflict against the recognized government of a State, but dependent on the support of a foreign power in the continuation of that conflict. The majority noted that the ICJ had set a particularly high standard for determining whether or not the United States was responsible for the activities of the contras. The central portion of the ICJ judgment on this point was quoted:

585. . . . United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purposes of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. . . . *For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective*

*control of the military or paramilitary operations in the course of which the alleged violations were committed.*<sup>24</sup>

The majority identified two substantial differences between the facts of the *Nicaragua* case and the facts in the *Tadić* case: first, the VRS was an occupying force, not a raiding army,<sup>25</sup> and second, the FRY clearly did control Bosnian Serb military activities until approximately 19 May 92.<sup>26</sup>

588. Consequently, the Trial Chamber must consider the essence of the test of the relationship between a *de facto* organ or agent, as a rebel force, and its controlling entity or principal, as a foreign Power, namely the more general question whether, even if there had been a relationship of great dependency on the one side, there was such a relationship of control on the other that, on the facts of the instant case, the acts of the VRS, including its occupation of opština Prijedor, can be imputed to the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro). . . .

In doing so it is neither necessary nor sufficient merely to show that the VRS was dependent, even completely dependent, on the VJ and the Federal Republic of Yugoslavia (Serbia and Montenegro). It must also be shown that the VJ and the Federal Republic of Yugoslavia (Serbia and Montenegro) exercised the potential for control inherent in that relationship of dependency or that the VRS had otherwise placed itself under the control of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro).

It was the position of the majority that the law applicable to State responsibility was also relevant to determining which body of law applied for individual criminal responsibility. In order to establish State responsibility, it was necessary to establish that the FRY exercised effective control over the VRS or the RS. Logistical support, personnel support, and common aims were insufficient.

598. This leads the Trial Chamber to a consideration of two relationships of especial importance to the question which this Trial Chamber must determine. The first is the relationship of General Mladić, and hence the VRS Main Staff, to Belgrade. . . . The only evidence which the Prosecution was able to adduce as to the command and control relationship between the VRS Main Staff and Belgrade was that provided by Colonel Selak. He said, speaking of a Prosecution exhibit displaying a link between the Main Staffs of the VRS and VJ after 18 May 1992 (Prosecution Exhibit 174):



[T]here was no real chain of command because officially the Commander of the army of the Republika Srpska was Colonel General Ratko Mladić. So this [link] is just *pro forma* because other relations between the Chief of Staff, the main staff of the Yugoslav Army and the main staff of the army of the Republika Srpska were not really existing but, in fact, they did co-ordinate.

Coordination is not the same as command and control. The only other evidence submitted by the Prosecution was that, in addition to routing all high-level VRS communications through secure links in Belgrade, a communications link for everyday use was established and maintained between VRS Main Staff Headquarters and the VJ Main Staff in Belgrade. No further evidence was offered by the Prosecution on the nature of this relationship.

599. What then of the second relationship, namely that between the SDS (and hence the *Republika Srpska*) and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro)? Unlike the situation confronted by the Court in the *Nicaragua* case, where the United States had largely selected and installed the political leaders of the *contras*, in the *Republika Srpska* political leaders were popularly elected by the Bosnian Serb people of the Republic of Bosnia and Herzegovina. Indeed, as previously noted, the independence of the *Republika Srpska* itself was declared at a vote of the Assembly of the Serbian People of Bosnia and Herzegovina on 9 January 1992. The Assembly and its leaders played a role in the overall conduct of the war both in the Republic of Bosnia and Herzegovina and beyond, in addition to the supply of paramilitary forces to supplement the fighting strength of the new VRS units, which forces took part in the military operations in opština Prijedor. . . .

605. Thus, while it can be said that the Federal Republic of Yugoslavia (Serbia and Montenegro), through the dependence of the VRS on the supply of *matériel* by the VJ, had the capability to exercise great influence and perhaps even control over the VRS, there is no evidence on which this Trial Chamber can conclude that the Federal Republic of Yugoslavia (Serbia and Montenegro) and the VJ ever directed or, for that matter, ever felt the need to attempt to direct, the actual military operations of the VRS, or to influence those operations beyond that which would have flowed naturally from the coordination of military objectives and activities by the VRS and VJ at the highest levels. In sum, while, as in the *Nicaragua* case, the evidence available to this Trial Chamber clearly shows that the "various forms of assistance provided" to the armed forces of the *Republika Srpska* by the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) was "crucial to the pursuit of their activities" and, as with the early years of the *contras'* activities, those forces were almost completely dependent on the supplies of the VJ to carry out offensive operations, evidence



that the Federal Republic of Yugoslavia (Serbia and Montenegro) through the VJ “made use of the potential for control inherent in that dependence,” or was otherwise given effective control over those forces and which it exercised, is similarly insufficient.

On the basis of its assessment of the law as contained in the *Nicaragua* decision (the effective control test) and its assessment of the facts, the majority found that the VRS and the RS could not be regarded as *de facto* organs or agents of the FRY. As a consequence, the civilian victims in the *Tadić* case could not be regarded as protected persons within the meaning of the Geneva Civilians Convention, because they were not in the hands of a party, of which they were not nationals, to an armed conflict. The Bosnian victims were in the hands of their Bosnian (Serb) fellow nationals. As a consequence, the grave breach provisions of the Geneva Conventions recognized in Article 2 of the ICTY Statute did not apply.<sup>27</sup>

Judge McDonald, continuing to adopt the approach she had formulated in the *Rajić Rule 61 Proceeding*, filed a robust dissent in which she argued that the majority had misinterpreted the *Nicaragua* decision and in any event had misapplied its mistaken interpretation to the facts. In her view, *Nicaragua* established two distinct tests for attributability: effective control and agency. She summarized her analysis as follows:

25. The separate opinion of Judge Ago [in the *Nicaragua* case], also cited by the majority, explains with lucidity the concept that a State can be found legally responsible even where there is no finding of agency. He states:

[T]he negative answer returned by the Court to the Applicant’s suggestion that the misdeeds committed by some members of the *contra* forces should be considered as acts imputable to the United States of America is likewise in conformity with the provisions of the International Law Commission’s draft. It would indeed be inconsistent with the principles governing the question to regard members of the *contra* forces as persons or groups acting in the name and on behalf of the United States of America. Only in cases where certain members of those forces happened to have been specifically charged by United States authorities to commit a particular act, or to carry out a particular task of some kind on behalf of the United States, would it be possible so to regard them. Only in such instances does international law recognize, as a rare exception to the rule, *that the conduct of persons or groups which are neither agents nor organs of a State, nor members of its apparatus even in the broadest acceptance of that term, may be held to be acts of that State*. The Judgment, accordingly, takes a correct view when, referring in particular to the atrocities, acts of violence or terrorism and other

inhuman actions that Nicaragua alleges to have been committed by the *contras* against the persons and property of civilian populations, it holds that the perpetrators of these misdeeds may not be considered as having been specifically charged by United States authorities to commit them unless, in certain concrete cases, unchallengeable proof to the contrary has been supplied.<sup>28</sup>

Therefore it appears that there are two bases on which the acts of the VRS could be attributed to the Federal Republic of Yugoslavia (Serbia and Montenegro): where the VRS acted as an agent of the Federal Republic of Yugoslavia (Serbia and Montenegro), which could be established by a finding of dependency on the one side and control on the other; or where the VRS was specifically charged by the Federal Republic of Yugoslavia (Serbia and Montenegro) to carry out a particular act on behalf of the Federal Republic of Yugoslavia (Serbia and Montenegro) thereby making the act itself attributable to the Federal Republic of Yugoslavia (Serbia and Montenegro). In *Nicaragua*, the court required a showing of effective control for this latter determination.

If “effective control” is the proper test, Judge McDonald, interpreting the same evidence and accepting the same facts, concluded that the FRY did effectively control the VRS, that the creation of the VRS was a legal fiction, and that the attack which provided the opportunity for Tadić to commit offenses had to have been planned before the VRS was created on 19 May 1992.

7. The evidence proves that the creation of the VRS was a legal fiction. The only changes made after the 15 May 1992 Security Council resolution were the transfer of troops, the establishment of a Main Staff of the VRS, a change in the name of the military organisation and individual units, and a change in the insignia. There remained the same weapons, the same equipment, the same officers, the same commanders, largely the same troops, the same logistics centres, the same suppliers, the same infrastructure, the same source of payments, the same goals and mission, the same tactics, and the same operations. Importantly, the objective remained the same: to create an ethnically pure Serb State by uniting Serbs in Bosnia and Herzegovina and extending that State from the Federal Republic of Yugoslavia (Serbia and Montenegro) to the Croatian Krajina along the important logistics and supply line that went through opština Prijedor, thereby necessitating the expulsion of the non-Serb population of the opština.

8. Although there is little evidence that the VRS was formally under the command of Belgrade after 19 May 1992, the VRS clearly continued to operate as an integrated and instrumental part of the Serbian war effort. This finding is supported by evidence that every VRS unit had been a unit in the JNA, the



command and staffs remaining virtually the same after the re-designation. The VRS Main Staff, the members of which had all been generals in the JNA and many of whom were appointed to their positions by the JNA General Staff, maintained direct communications with the VJ General Staff via a communications link from Belgrade. . . . The ties between the military in Bosnia and Herzegovina and the SDS political party, which advocated a Greater Serbia, similarly remained unchanged after the re-designation.

9. In addition, the evidence establishes that the VRS, in continuing the JNA operation to take over opština Prijedor, executed the military operation for the benefit of the Federal of Yugoslavia (Serbia and Montenegro).

The prosecution has appealed the Trial Chamber decision in Tadić, arguing:

- The Trial Chamber erred in relying upon the *Nicaragua* case and the “effective control” test to determine the applicability of the grave breach provisions of the Geneva Conventions.
- The provisions of the Geneva Conventions and the relevant principles and authorities of international humanitarian law only require that the perpetrator be demonstrably linked to a party to an international armed conflict of which the victim is not a national, for the grave breach provisions to be rendered applicable.
- Assuming the *Nicaragua* case is to be relied upon, the decision in the *Nicaragua* case also applied an “agency” test, which is a more appropriate standard for determining the applicability of the grave breach provisions.
- In any event, assuming that the “effective control” test mentioned in the *Nicaragua* case is applicable to determining the applicability of grave breach provisions, the Trial Chamber erred in finding that this test is not satisfied on the facts of this case, which also satisfy the “agency” test outlined in the *Nicaragua* case.<sup>29</sup>

The main argument advanced by the prosecution is that the *Nicaragua* case is not relevant to the determination of the applicability of the grave breach provisions or to determining individual criminal responsibility. It is essential to establish the existence of an international armed conflict in Bosnia at the time when Tadić is alleged to have committed his crimes. It is then necessary to establish that the perpetrator (Tadić) has a demonstrable link to one party to the international armed conflict while the victim is linked to a neutral or to a party on the other side. Further, as an aside, although Article 4 of the Civilians Convention defines “protected persons” as persons in the hands of a party of



which they are not nationals, determination of nationality is not a simple process when States are in the process of decomposition. A simplistic assumption that persons must be nationals of a new State simply because they live in its territory at the moment of creation is inappropriate.<sup>30</sup>

### **Violations of the Laws or Customs of War**

Article 3 of the ICTY Statute gives the Tribunal power to prosecute persons violating the laws or customs of war. Certain violations are enumerated in the article, but the list is open-ended. In the *Tadić Jurisdiction Decision*, the Appeals Chamber considered the meaning of the expression “violation of the laws or customs of war” in the ICTY Statute. Its assessment may have an impact outside the Tribunal. The defense argued that Article 3 applied exclusively to international conflicts.<sup>31</sup> The prosecution argued that the expression “laws or customs of war” was at one time viewed as a term of art referring to laws or customs applicable exclusively to declared wars. As declared wars became uncommon, the expression was viewed as a term of art applicable to all international armed conflicts. In the opinion of the prosecution, with the development of treaty law specifically intended to apply to non-international armed conflicts, and of customary law applicable to non-international armed conflicts, the expression “laws or customs of war” had become a term of art which applies to all armed conflicts, although it does not bear the same content in international and non-international conflicts. The prosecution also argued that Article 3 enabled the Tribunal to prosecute all violations of applicable international humanitarian law treaties. Specifically, with reference to the *Tadić* case, the prosecution argued that the ICTY had the power to prosecute for violations of the rules in Common Article 3 of the Geneva Conventions committed in international or internal conflicts.<sup>32</sup>

Although the Appeals Chamber utilized a relatively conservative approach with respect to Article 2, it adopted an extremely progressive and creative approach concerning Article 3 of the Statute. The Chamber adopted the approach favored by the prosecution and went on at some length to elaborate upon its implications and upon the content of the relevant customary law, particularly that part of customary law which, in its view, applies to all armed conflicts regardless of classification. It is reasonable to assume that the Chamber focused its analysis on this part of customary law, both because it shared the view it apparently assigned to the Security Council that the conflicts in the territory of the former Yugoslavia are many and of mixed character, and because the content of this part of customary law had not been reviewed by a

tribunal in the past. In paragraph 94 of the *Jurisdiction Decision*, the Appeals Chamber set forth the requirements for an offense to be subject to prosecution under Article 3 of the Statute:

- The violation must constitute an infringement of a rule of international humanitarian law.
- The rule must be customary in nature, or if it belongs to treaty law, the required conditions must be met.
- The violations must be “serious,” that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a “serious violation of international humanitarian law,” although it may be regarded as falling afoul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby “private property must be respected” by any army occupying an enemy territory.
- The violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

It follows that it does not matter whether the “serious violation” has occurred within the context of an international or an internal armed conflict, as long as the requirements set out above are met.

The Chamber regarded Article 3 of the Statute as a general or residual clause covering all violations of humanitarian law not falling within Articles 2, 4, or 5. In so doing, it did not avoid or evade the classification issue. Classification remains relevant (a) when the sole source of a rule is a treaty which applies to a specific type of conflict (Protocol I, the Geneva Conventions and the Hague Conventions apply to international conflicts. Protocol II applies to internal conflicts.), or (b), when the customary law applies to a specific type of conflict.

Concerning treaty provisions, other than the grave breach provisions of the Geneva Conventions, the Chamber indicated it has jurisdiction to punish under Section 3 of the Statute:

143. Before both the Trial Chamber and the Appeals Chamber, Defence and Prosecution have argued the application of certain agreements entered into by the conflicting parties. It is therefore fitting for this Chamber to pronounce on this. It should be emphasised again that the only reason behind the stated purpose of the drafters that the International Tribunal should apply customary

international law was to avoid violating the principle of *nullum crimen sine lege* in the event that a party to the conflict did not adhere to a specific treaty. (Report of the Secretary-General, at para. 34). It follows that the International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogated from peremptory norms of international law, as are most customary rules of international humanitarian law.

Although the Chamber has adopted a very progressive approach concerning the content of customary law applicable to internal conflict, it did not state that customary law is identical for all conflicts. In particular, it held:

126. The emergence of the aforementioned general rules on internal conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather the general essence of those rules and not the detailed regulation they may contain has become applicable to internal conflicts.

The decision therefore, envisages charges under Article 3 of the Statute: (a) where an armed conflict must be established but classification is irrelevant because the basis for the charge is a rule of customary law which applies to all armed conflicts; (b) where an armed conflict must be established and classified as international because the basis for the charge is a rule of treaty or customary law which applies exclusively to international conflicts; or (c) where an armed conflict must be established and classified as internal because the basis for the charge is a rule of treaty or customary law which applies exclusively to internal conflicts.

As a general statement, evidenced by practice before the International Court of Justice, proof that a rule is a part of customary law is an extremely difficult task.<sup>33</sup> The Appeals Chamber has, however, provided a relatively elaborate discussion of the current content of customary law. In particular, it has indicated that the following rules apply to all conflicts regardless of classification:

- The rules in Common Article 3 (para 102);
- The principles in UN General Assembly Resolution 2444 (paras. 110 and 112); and



- The principles in UN General Assembly Resolution 2675 (paras. 111 and 112).

In addition to elaborating upon the content of customary law applicable to all conflicts and also to internal conflicts, the Chamber countered a defense assertion that the law applicable to internal armed conflicts did not entail individual criminal responsibility. Indeed, neither Additional Protocol II nor Common Article 3 contain provisions referring to criminal liability, although each of the Geneva Conventions does contain a relevant provision that states in part: "Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches."<sup>34</sup> The Tribunal addressed the issue as follows:

128. . . . Faced with similar claims with respect to the various agreements and conventions that formed the basis of its jurisdiction, the International Military Tribunal at Nuremberg concluded that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches. (See *THE TRIAL OF MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY*, Part 22, at 445, 467 (1950)). The Nuremberg Tribunal considered a number of factors relevant to its conclusion that the authors of particular prohibitions incur individual responsibility: the clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalize the prohibition, including statements by governments officials and international organizations, as well as punishment of violations by national courts and military tribunals (*id.*, at 445–47, 467). Where these conditions are met, individuals must be held criminally responsible, because, as the Nuremberg Tribunal concluded:

"[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." (*Id.*, at 447).

129. Applying the foregoing criteria to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts. Principles and rules of humanitarian law reflect "elementary considerations of humanity" widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.

130. Furthermore, many elements of international practice show that States intend to criminalize serious breaches of customary rules and principles on internal conflict.

The Chamber's interpretation of the scope of customary law embraced by the expression "violations of the laws or customs of war" is indeed quite progressive. Reputable authorities have been of the view that no customary law exists for internal conflict<sup>35</sup> and that there is no basis for an assignment of criminal responsibility for acts occurring in internal conflicts except by a domestic court in the State where the conflict occurred.<sup>36</sup> Further, the basis for the conclusion that a body of customary law applicable to all conflicts exists might also be subjected to criticism. Extracts from the oral argument of the United States in the *Nuclear Weapons Advisory Opinion* case highlight the distinction between the approach of the Tribunal and the more traditional approach:

It is a fundamental principle of international law that restrictions on States—particularly those affecting the conduct of armed conflict—cannot be presumed; they must, rather, be found in conventional law specifically accepted by States, or in customary law generally accepted as such by the community of nations. The Court made this vital point in the case of *Nicaragua v. United States* (I.C.J. Reports 1986, p.135), recalling that

in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited.

An even higher standard applies in establishing the existence of peremptory norms of international law, which must be accepted and recognized by the international community as norms from which no derogation is permitted. . . .<sup>37</sup>

As the Court has clearly established, customary international law is created by a general and consistent practice of States, followed out of a sense of legal obligation. The Court has noted in the *North Sea Continental Shelf* case that the incorporation of a norm into customary international law requires "extensive and virtually uniform" State practice.<sup>38</sup>

As a matter of law, the General Assembly's resolutions could only be declarative of principles of customary international law to the extent that such principles have in fact, been recognized already by the international community.<sup>39</sup>

When contrasted with the rigorous approach adopted by the International Court of Justice and other tribunals towards proof of customary law in other areas of international law, the substantiation provided by the Appeals Chamber for its conclusions concerning customary law is limited. The support for the conclusion that a certain common body of customary law applied to both international and internal conflicts consists primarily of two UN General Assembly Resolutions, 2444 of 19 December 1968 and 2675 of 9 December 1970, and a quotation from the *Nicaragua* decision.<sup>40</sup> Support for the conclusion that there is a significant body of customary law applicable to internal conflicts is more firmly based, consisting of examples from the Spanish Civil War of 1936–1939 (para. 100), the Chinese civil war that ended in 1949 (para. 102), the Nicaragua contra struggles of the 1980s (para. 103), the 1967 conflict in Yemen (para. 105), the Congo civil war of the 1960s (para. 106), the 1980s conflict in El Salvador (para. 107), and various declarations by States and international organizations urging States involved in internal conflicts to comply with certain minimum standards.

It must, however, be conceded that tribunals which have addressed the issue of the customary law content of international humanitarian law have tended to avoid detailed proofs. The International Military Tribunal at Nuremberg,<sup>41</sup> the tribunal which decided the *High Command Case*,<sup>42</sup> and even the ICJ itself in the *Nicaragua Case*<sup>43</sup> have all tended to reach essentially unsubstantiated conclusions on these matters. In the words of Theodor Meron:

Only a few international judicial decisions discuss the customary law nature of international humanitarian law instruments. These decisions nevertheless point to certain trends in this area, including a tendency to ignore, for the most part, the availability of evidence of state practice (scant as it may have been) and to assume that noble humanitarian principles that deserve recognition as the positive law of the international community have in fact been recognized as such by states. The “ought” merges with the “is,” the *lex ferenda* with the *lex lata*. The teleological desire to solidify the humanizing content of the humanitarian norms clearly affects the judicial attitudes underlying the “legislative” character of the judicial process. Given the scarcity of actual practice, it may well be that, in reality, tribunals have been guided, and are likely to continue to be guided, by the degree of offensiveness of certain acts to human dignity; the more heinous the act, the more the tribunal will assume that it violates not only a moral principle of humanity but also a positive norm of customary law.<sup>44</sup>

Indeed, the Appeals Chamber, in the *Jurisdiction Decision*, has provided the most sophisticated and rigorous judicial determination to date of the customary law aspects of international humanitarian law. One might hope,



however, that the ICTY will return to some of these issues in future to strengthen their legal foundations.

### **Crimes against Humanity**

In contrast to both the relatively conservative approach taken concerning Article 2 of the Statute and the somewhat progressive approach taken concerning Article 3, in the *Tadić Jurisdiction Decision* the Appeals Chamber adopted a relatively middle-of-the-road approach concerning the interpretation of Article 5 with respect to crimes against humanity. The approach taken in the Charter of the International Military Tribunal at Nuremberg<sup>45</sup> and in the judgment of the International Military Tribunal (IMT)<sup>46</sup> was to link crimes against humanity to other offenses within the jurisdiction of the IMT and, in particular, to link crimes against humanity to the existence of an international armed conflict. On the other hand, Control Council Law No. 10,<sup>47</sup> which provided the basis for several subsequent trials at Nuremberg by American tribunals, defined crimes against humanity but did not restrict the jurisdiction of tribunals empowered under it to offenses committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal."<sup>48</sup> As a result, the tribunals in some of the subsequent proceedings regarded crimes against humanity as offenses which need not have a link with international armed conflict.<sup>49</sup>

Article 5 of the ICTY Statute gave the Tribunal the power to prosecute persons committing crimes against humanity "when committed in armed conflict." The defense argued that insofar as Article 5 purported to regulate conduct in internal conflict it offended against the *nullum crimen* principle, because in customary law crimes against humanity require a nexus with international armed conflict.<sup>50</sup> The prosecution responded that under existing customary law, crimes against humanity did not require a nexus with any form of armed conflict and that as a result, since Article 5 adopted an approach that was more restrictive than customary law, it did not breach the *nullum crimen* principle.<sup>51</sup> The Tribunal decided (para. 141), "It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict." It went on to indicate the prosecution argument may well have been correct, and in any event Article 5 was in compliance with the *nullum crimen* principle.

The Trial Chamber in the *Tadić Trial Decision* devoted substantial space to consideration of crimes against humanity. Article 5 of the ICTY Statute gives the Tribunal the power to prosecute persons responsible for crimes against

humanity “when committed in armed conflict” and “directed against any civilian population.” The Trial Chamber accepted the test set out by the Appeals Chamber in the *Tadić Jurisdiction Decision* for the existence of an armed conflict: “[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” Finding the existence of an armed conflict (para. 628), it then considered the nexus between the act or omission and the armed conflict. The prosecution position—that the nexus was that the act must occur during the course of an armed conflict—was accepted, but the Chamber added two caveats: the act must be linked geographically as well as temporally with the armed conflict, and the act must not be unrelated to the armed conflict, i.e., it must not be done for purely personal motives of the perpetrator (paras. 633, 634). Concerning “directed against any civilian population,” the Chamber held that “any” made it clear that crimes against humanity could also be committed against stateless persons or civilians of the same nationality as the perpetrator (para. 635). Further, “civilian” would clearly exclude combatants, but it would otherwise be given a very broad definition, including, for example, hospital patients and resistance fighters who had laid down their arms (paras. 639–43). The requirement that crimes against humanity be directed against a civilian “population” was construed as requiring not that the entire population of a State or territory be victimized, but that such crimes be of a collective nature, not single or isolated acts (para. 644). The prosecution argued that the term “population” in Article 5 implied that the accused must participate in a widespread or systematic attack against a relatively large victim group. The defense position was that violations must be both widespread and systematic. The Chamber accepted the prosecution approach:

648. It is therefore the desire to exclude isolated or random acts from the notion of crimes against humanity that led to the inclusion of the requirement that the acts must be directed against a civilian “population,” and either a finding of widespreadness, which refers to the number of victims, or systematicity, indicating that a pattern or methodical plan is evident, fulfils this requirement.

The Chamber went on to consider whether or not single acts could constitute crimes against humanity:

649. A related issue is whether a single act by a perpetrator can constitute a crime against humanity. A tangential issue, not at issue before this Trial Chamber, is whether a single act in and of itself can constitute a crime against



humanity. This issue has been the subject of intense debate, with the jurisprudence immediately following the Second World War being mixed. The American tribunals generally supported the proposition that a massive nature was required, while the tribunals in the British Zone came to the opposite conclusion, finding that the mass element was not essential to the definition, in respect of either the number of acts or the number of victims and that "what counted was not the mass aspect, but the link between the act and the cruel and barbarous political system, specifically, the Nazi regime." Clearly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable. Although it is correct that isolated, random acts should not be included in the definition of crimes against humanity, that is the purpose of requiring that the acts be directed against a civilian *population* and thus "[e]ven an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or persecution."

Although the Statute did not address the issue, the Chamber turned next to the issue of whether a discriminatory intent was a requirement for all crimes against humanity and not only for persecution under Article 5(h). No such requirement was contained in the Nuremberg Charter, Control Council Law No. 10, or the Tokyo Charter. Nevertheless, the Chamber imposed such a requirement in its interpretation of the Statute.

652. Additionally this requirement is not contained in the Article on crimes against humanity in the I.L.C. Draft Code nor does the Defence challenge its exclusion in the Prosecution's definition of the offence. Significantly, discriminatory intent as an additional requirement for all crimes against humanity was not included in the Statute of this International Tribunal as it was in the Statute for the International Tribunal for Rwanda, the latter of which has, on this point, recently been criticised. Nevertheless, because the requirement of discriminatory intent on national, political, ethnic, racial or religious grounds for all crimes against humanity was included in the *Report of the Secretary-General*, and since several Security Council members stated that they interpreted Article 5 as referring to acts taken on a discriminatory basis, the Trial Chamber adopts the requirement of discriminatory intent for all crimes against humanity under Article 5.

The Chamber then addressed what has been referred to as the "policy element." Crimes against humanity involve a deliberate policy made by an entity to target a civilian population.



653. . . . Traditionally this requirement was understood to mean that there must be some form of policy to commit these acts. As explained by the Netherlands *Hoge Raad* in *Public Prosecutor v. Menten*:

The concept of “crimes against humanity” also requires—although this is not expressed in so many words in the above definition [Article 6(c) of the Nürnberg Charter]—that the crimes in question form a part of a system based on terror or constitute a link in a consciously pursued policy directed against particular groups of people.

Importantly, however, such a policy need not be formalized and can be deduced from the way in which the acts occur. Notably, if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not.

Further, it decided that the policy could be determined by non-State actors as well as by States.

654. An additional issue concerns the nature of the entity behind the policy. The traditional conception was, in fact, not only that a policy must be present but that the policy must be that of a State, as was the case in Nazi Germany. The prevailing opinion was, as explained by one commentator, that crimes against humanity, as crimes of a collective nature, require a State policy “because their commission requires the use of the state’s institutions, personnel and resources in order to commit, or refrain from preventing the commission of, the specified crimes described in Article 6(c) [of the Nürnberg Charter].” While this may have been the case during the Second World War, and thus the jurisprudence followed by courts adjudicating charges of crimes against humanity based on events alleged to have occurred during this period, this is no longer the case. As the first international tribunal to consider charges of crimes against humanity alleged to have occurred after the Second World War, the International Tribunal is not bound by past doctrine but must apply customary international law as it stood at the time of the offences. In this regard the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have *de facto* control over, or are able to move freely within, defined territory. The Prosecution in its pre-trial brief argues that under international law crimes against humanity can be committed on behalf of entities exercising *de facto* control over a particular territory but without international recognition or formal status of a *de jure* State, or by a terrorist group or organization. The Defence does not challenge this assertion, which conforms with recent statements regarding crimes against humanity.

Finally, the Chamber considered the intent necessary for crimes against humanity and concluded:

659. Thus if the perpetrator has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis and does not commit his act for purely personal motives completely unrelated to the attack on the civilian population, that is sufficient to hold him liable for crimes against humanity. Therefore the perpetrator must know that there is an attack on the civilian population, know that his act fits in with the attack and the act must not be taken for purely personal reasons unrelated to the armed conflict.

The prosecution is at present appealing two of the findings of the Trial Chamber on the law applicable to the ICTY related to crimes against humanity. With reference to the finding that crimes against humanity cannot be committed for purely personal motives, the prosecution argues that the motive for committing crimes against humanity is irrelevant.<sup>52</sup> With reference to the finding that all crimes against humanity require a discriminatory intent, the prosecution argues that the ICTY Statute includes no such requirement, that customary law does not require a discriminatory intent for all crimes against humanity, and that Article 5 of the ICTY Statute is intended to reflect customary law.<sup>53</sup>

### **Individual Criminal Responsibility**

Article 7 of the ICTY Statute addresses individual criminal responsibility. Article 7(1) of the Statute provides, in part: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime . . . shall be individually responsible for the crime."

**Forms of Criminal Participation.** The *Tadić Trial Decision* provides the first extended judicial consideration of this provision. It states:

692. In sum, the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question.

The Chamber elaborated on the meaning of “substantially”:

688. . . . While there is no definition of “substantially,” it is clear from the aforementioned cases that the substantial contribution requirement calls for a contribution that in fact has an effect on the commission of the crime. This is supported by the foregoing Nürnberg cases where, in virtually every situation, the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed. For example, if there had been no poison gas or gas chambers in the *Zyklon B* cases, mass exterminations would not have been carried out in the same manner. The same analysis applies to the cases where the men were prosecuted for providing lists of names to German authorities. Even in these cases, where the act in complicity was significantly removed from the ultimate illegal result, it was clear that the actions of the accused had a substantial and direct effect on the commission of the illegal act, and that they generally had knowledge of the likely effect of their actions.

It defined “aiding and abetting” as follows:

689. The Trial Chamber finds that aiding and abetting includes all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present. Under this theory, presence alone is not sufficient if it is an ignorant or unwilling presence. However, if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have a direct and substantial effect on the commission of the illegal act, then it is sufficient on which to base a finding of participation and assign the criminal culpability that accompanies it.

The Chamber also discussed the significance of physical presence during the commission of an offense:

690. Moreover, when an accused is present and participates in the beating of one person and remains with the group when it moves on to beat another person, his presence would have an encouraging effect, even if he does not physically take part in this second beating, and he should be viewed as participating in this second beating as well. This is assuming that the accused has not actively withdrawn from the group or spoken out against the conduct of the group.

691. However, actual physical presence when the crime is committed is not necessary; just as with the defendants who only drove victims to the woods to be killed, an accused can be considered to have participated in the commission of a crime based on the precedent of the Nürnberg war crimes trials if he is found to



be “concerned with the killing.” However, the acts of the accused must be direct and substantial.

**Command Responsibility.** Article 7(3) addresses command responsibility:

The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

The scope of Article 7(3) has been addressed in two preliminary motions decided in the *Blaskić* case, one concerning the *mens rea* required for charges alleging command responsibility, and the other concerning whether or not the failure to punish provision in Article 7(3) offended the *nullum crimen* principle. In the *mens rea* motion, the defense argued that the “knew or had reason to know” standard should be defined as: “(1) actual knowledge; or (2) wanton disregard of objective facts within the accused’s actual possession compelling the conclusion that the accused’s subordinates were about to commit or had committed the criminal acts alleged in the indictment.”<sup>54</sup>

In response, the prosecution argued that a decision on *mens rea* at the pre-trial stage was premature, as the issue was too abstract in the absence of evidence to be considered at trial. If the issue was appropriate for consideration before the trial, the prosecution argued that a proper statement of the *mens rea* standard was:

- Actual knowledge proved by direct evidence, or
- Actual knowledge proved by circumstantial evidence, the “must have known” standard. The prosecution argued that the Tribunal should not reject the “must have known” *mens rea* standard because, although it may be conceptually similar to actual knowledge established by means of direct evidence, the evidentiary implications of knowledge inferred from circumstantial evidence are significantly different. In particular, where the crimes of subordinates are a matter of public notoriety, are numerous, or occur over a prolonged period or in a wide geographical area, there is a presumption that the commander had the requisite knowledge in the absence of evidence to the contrary, or
- Wanton disregard not only of facts within his actual possession but also of facts that are not within his actual possession by reason of a failure on his part to supervise properly his subordinates and in particular to require and obtain

adequate reports or information and to be apprised of the actions of his subordinates. The appropriate *mens rea* standard under international law is wanton disregard of information of a general nature within the reasonable access of a commander indicating the likelihood of actual or prospective criminal conduct on the part of his subordinates.<sup>55</sup>

The Trial Chamber rejected consideration of the substantive issues related to *mens rea* as premature but granted the accused permission to raise the issues again at trial.<sup>56</sup>

Concerning the defense motion alleging that the provision related to failure to punish liability offended the *nullum crimen* principle, the Chamber found “that the case law and the international conventions which enshrine the principle of the command responsibility of whoever fails to punish subordinates who have committed crimes are fully adequate.”<sup>57</sup>

10. As regards international case-law, in the Tokyo trials, the Prime Minister of Japan, Hideki Tojo, was found guilty by the International Military Tribunal for the Far East on the following grounds:

(He) took no adequate steps to punish offenders (who ill-treated prisoners and internees) and to prevent the commission of similar offences in the future. (. . .) He did not call for a report on the [Bataan death march]. When in the Philippines in 1943 he made perfunctory inquiries about the march but took no action. No one was punished. (. . .) Thus the head of the Government of Japan knowingly and wilfully refused to perform the duty which lay upon that Government of enforcing performance of the laws of war.” [20 Tokyo Trials, 49845-49846].

Although in its motion the Defence pleads that he “was found criminally responsible for both failure to prevent the recurrence of crimes and failure to punish; proof of both elements was required for criminal liability to attach” (p. 21), the reasoning underlying that decision in no way justifies this argument. The decision clearly held Tojo responsible for having failed to punish his subordinates and thus emphasised that “No one was punished.” That statement is based on the following reasoning: failing to punish subordinates inevitably means failing to prevent the recurrence of crimes, whereas by punishing subordinates, such recurrence is naturally prevented, with the result that failure to punish alone is sufficient grounds for command responsibility.

The Chamber also found support for its view in the *Hostage Case* (para. 11).

As to treaty law basis for failure to punish liability, the chamber stated:

12. In respect of conventional law, it should be noted that the existence of such a principle of responsibility is also specified in the provisions of Protocol I. A review of the official record of the Geneva diplomatic conference which adopted the Protocol shows that Articles 86 and 87 were adopted by consensus by the delegations of more than 90 States present at the 45th plenary meeting. . . .

Thus Protocol I imposes, in Article 86(2), penal or disciplinary responsibility on the part of superiors who did not take all practicable measures within their competence "to prevent or repress the offence" committed by their subordinates. As sanctioning the perpetrator of the crime is the effective means of repressing the offense, the Protocol further considers that an omission to punish constitutes a failure to comply with an obligation which engages command responsibility. And as Article 87(3) provides that the High Contracting Parties and the Parties to the conflict must demand of any commander that he implement the penal and disciplinary measures against the perpetrators of violations, it demonstrates even more clearly and specifically that, according to the Protocol, any failure to punish an offense is grounds for command responsibility.

### Potential Defenses

**Duress.** Article 7(4) of the ICTY Statute addresses the issue of superior orders: "The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires." Although the statutory provision ensures that superior orders, of themselves, will not constitute a defense, in most cases the issue of superior orders will be linked with duress, and neither the Statute nor the older case law adequately addresses duress as a potential defense. This poses a significant problem, because in general, duress may constitute a complete defense to all criminal charges in civil law systems, but it is not a defense to murder-type charges in common law systems. In the *Erdemović Case*, Drazen Erdemović, a Bosnian Croat who was a member of a Bosnian Serb killing squad at Srebrenica which killed approximately 1,200 unarmed civilians and who personally killed between ten and a hundred persons, submitted a guilty plea to a crime against humanity charge. With his guilty plea, however, he also stated:

Your Honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: "If you're sorry for them, stand up, line up with them and we will kill you too." I am not sorry for myself but for



my family, my wife and son who then had nine months, and I could not refuse because then they would have killed me.<sup>58</sup>

The Trial Chamber, composed entirely of judges from civil law systems—Jorda (France), Odio Benito (Costa Rica), and Riad (Egypt)—accepted the guilty plea after devoting substantial heed to its validity in the judgment. Although the Chamber did not consider that a duress defense had been established in the case of Erdemović, it also indicated that in certain carefully circumscribed circumstances duress could constitute a complete defense to a crime against humanity charge (paras. 13–21).

Erdemović appealed his sentence, and the duress issue was considered by the Appeals Chamber. The Appeals Chamber issued four separate opinions addressing duress and by a majority of three to two found that “duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings.”<sup>59</sup> Judge McDonald (USA) and Judge Vohrah (Malaysia) in a joint separate opinion, and Judge Li (China) in a separate and dissenting opinion held that duress was not a complete defense. Judge Cassese (Italy) and Judge Stephen (Australia) submitted separate dissenting opinions indicating that duress could constitute a complete defense in cases involving the killing of innocent persons, in limited circumstances.

Judge McDonald and Judge Vohrah found that no customary international law rule could be derived on the question of duress as a defense to the killing of innocent persons (paras. 46–55). They then reviewed a large, but not exhaustive, number of national systems in an attempt to determine whether there was an applicable general principle of law recognized by civilized nations. They concluded: “66. . . . it is, in our view, a general principle of law recognized by civilized nations that an accused person is less blameworthy and less deserving of the full punishment when he performs a certain prohibited act under duress.” On the other hand, “67. The rules of the various legal systems of the world are, however, largely inconsistent regarding the specific question whether duress affords a complete defence to a combatant charged with a war crime or a crime against humanity involving the killing of innocent persons.” The two judges then went on to deny duress as a complete defense, on policy grounds.

75. The resounding point from these eloquent passages is that the law should not be the product or slave of logic or intellectual hair-splitting, but must serve broader normative purposes in light of its social, political and economic role. It is noteworthy that the authorities we have just cited issued their cautionary words

in respect of domestic society and in respect of a range of ordinary crimes including kidnapping, assault, robbery and murder. Whilst reserving our comments on the appropriate rule for domestic national contexts, we cannot but stress that we are not, in the International Tribunal, concerned with ordinary domestic crimes. The purview of the International Tribunal relates to war crimes and crimes against humanity committed in armed conflicts of extreme violence with egregious dimensions. We are not concerned with the actions of domestic terrorists, gang-leaders and kidnappers. We are concerned that, in relation to the most heinous crimes known to humankind, the principles of law to which we give credence have the appropriate normative effect upon soldiers bearing weapons of destruction and upon the commanders who control them in armed conflict situations. The facts of this particular case, for example, involved the cold-blooded slaughter of 1,200 men and boys by soldiers using automatic weapons. We must bear in mind that we are operating in the realm of international humanitarian law which has, as one of its prime objectives, the protection of the weak and vulnerable in such a situation where their lives and security are endangered. Concerns about the harm which could arise from admitting duress as a defence to murder were sufficient to persuade a majority of the House of Lords and the Privy Council to categorically deny the defence in the national context to prevent the growth of domestic crime and the impunity of miscreants. Are they now insufficient to persuade us to similarly reject duress as a complete defence in our application of laws designed to take account of humanitarian concerns in the arena of brutal war, to punish perpetrators of crimes against humanity and war crimes, and to deter the commission of such crimes in the future? If national law denies recognition of duress as a defence in respect of the killing of innocent persons, international criminal law can do no less than match that policy since it deals with murders often of far greater magnitude. If national law denies duress as a defence even in a case in which a single innocent life is extinguished due to action under duress, international law, in our view, cannot admit duress in cases which involve the slaughter of innocent human beings on a large scale. It must be our concern to facilitate the development and effectiveness of international humanitarian law and to promote its aims and application by recognising the normative effect which criminal law should have upon those subject to them. Indeed, Security Council Resolution 827 (1993) establishes the International Tribunal expressly as a measure to "halt and effectively redress" the widespread and flagrant violations of international humanitarian law occurring in the territory of the former Yugoslavia and to contribute thereby to the restoration and maintenance of peace.

They considered, but rejected, possible exceptions such as proportionality or cases where the victims would die regardless of the participation of the accused. Their preferred approach was to consider duress exclusively as a mitigating



factor during the sentencing phase. The rejection of duress as a complete defense was, however, applicable to soldiers alone:

84. Secondly, as we have confined the scope of our inquiry to the question whether duress affords a complete defence to a soldier charged with killing innocent persons, we are of the view that soldiers or combatants are expected to exercise fortitude and a greater degree of resistance to a threat than civilians, at least when it is their own lives which are being threatened. Soldiers, by the very nature of their occupation, must have envisaged the possibility of violent death in pursuance of the cause for which they fight. The relevant question must therefore be framed in terms of what may be expected from the ordinary soldier in the situation of the Appellant. What is to be expected of such an ordinary soldier is not, by our approach, analysed in terms of a utilitarian approach involving the weighing up of harms. Rather, it is based on the proposition that it is unacceptable to allow a trained fighter, whose job necessarily entails the occupational hazard of dying, to avail himself of a complete defence to a crime in which he killed one or more innocent persons.

Judge Li, in his separate dissenting opinion, adopted somewhat similar reasoning (paras. 5–12). Judge Cassese submitted a forceful dissenting opinion:

11. I also respectfully disagree with the conclusions of the majority of the Appeals Chamber concerning duress, as set out in the Joint Separate Opinion of their Honours Judge McDonald and Judge Vohrah and on the following grounds:

(i) after finding that *no specific international rule* has evolved on the question of whether duress affords a complete defence to the killing of innocent persons, the majority should have drawn the only conclusion imposed by law and logic, namely that the *general* rule on duress should apply—subject, of course, to the necessary requirements. In logic, if no exception to a general rule be proved, then the general rule prevails. Likewise in law, if one looks for a *specific* rule governing a specific aspect of a matter and concludes that no such rule has taken shape, the only inference to be drawn is that the specific aspects is regulated by the rule governing the general matter:

(ii) instead of this simple conclusion, the majority of the Appeals Chamber has embarked upon a detailed investigation of “practical policy considerations” and has concluded by upholding “policy considerations” substantially based on English law. I submit that this examination is *extraneous to the task of our Tribunal*. This International Tribunal is called upon to apply international law, in particular our Statute and principles and rules of international humanitarian law



and international criminal law. Our International Tribunal is a court of law; it is bound only by international law. It should therefore refrain from engaging in meta-legal analyses. . . .

12. In short, I consider that: (1) under international criminal law duress may be generally urged as a defence, provided certain strict requirements are met; when it cannot be admitted as a defence, duress may nevertheless be acted upon as a mitigating circumstance: (2) with regard to war crimes or crimes against humanity whose underlying offence is murder or more generally the taking of human life, no special rule of customary international law has evolved on the matter; consequently, even with respect to these offences the *general rule on duress* applies; it follows that duress may amount to a defence provided that its stringent requirements are met. . . .

The relevant case-law is almost unanimous in requiring four strict conditions to be met for duress to be upheld as a defence, namely:

(i) the act charged was done under an immediate threat of severe and irreparable harm to life or limb;

(ii) there was no adequate means of averting such evil;

(iii) the crime committed was not disproportionate to the evil threatened (this would, for example, occur in case of killing in order to avert an assault). In other words, in order not to be disproportionate, the crime committed under duress must be, on balance, the lesser of two evils;

(iv) the situation leading to duress must not have been voluntarily brought about by the person coerced.

In addition, the relevant national legislation supports the principle that the existence in law of any special duty on the part of the accused towards the victim may preclude the possibility of raising duress as a defence.

17. It is worth insisting on the fourth requirement just mentioned, in order to highlight its particular relevance to war-like situations. According to the case-law on international humanitarian law, duress or necessity cannot excuse from criminal responsibility the person who intends to avail himself of such defence if he freely and knowingly chose to become a member of a unit, organisation or group institutionally intent upon actions contrary to international humanitarian law.

Judge Stephen, in a separate and dissenting opinion, agreed with Judge Cassese and criticized the rationale of the common law approach and the desirability of transferring it to the international arena (paras. 64–67).

**Reprisals.** A reprisal is an illegal act resorted to after the other side in an armed conflict has committed unlawful acts and continues them after being called upon to cease. The reprisal is not a retaliatory act or a simple act of vengeance; it is a crude law-enforcement device. It must be roughly proportionate to the original wrongdoing, and it must be terminated as soon as the original wrongdoer ceases illegal actions.<sup>60</sup> In certain circumstances, the defense of reprisal may be raised to charges for offenses within the jurisdiction of the ICTY. Reprisals against several categories of persons and objects are prohibited by the treaty law applicable to international armed conflict. In particular, reprisals are prohibited against civilians and civilian objects. For all practical purposes, the only legitimate reprisal targets in international conflict are combatants and certain other military objectives. The treaty law of internal conflicts does not address the reprisal issue. UN General Assembly Resolution 2675 indicates that reprisals against civilians are prohibited in all circumstances.<sup>61</sup>

The question of the reprisal defense was litigated in the Rule 61 proceeding concerning Milan Martić in February 1996. The prosecution argued that the Chamber should decide that reprisals against civilians were prohibited in all conflicts, including internal conflicts, because (1) an explicit prohibition already existed in treaties applicable to international conflict; (2) UNGA Resolution 2675 reflects the state of customary law for all conflicts; (3) Article 4 of Protocol II requiring protection of civilians “in all circumstances” implicitly prohibits reprisals; and (4) reprisals are an ineffective means of law enforcement.<sup>62</sup> The Trial Chamber agreed:

17. Therefore, the rule which states that reprisals against the civilian population as such, or individual civilians, are prohibited in all circumstances, even when confronted by wrongful behaviour of the other party, is an integral part of customary international law and must be respected in all armed conflicts.<sup>63</sup>

### Future Developments

The jurisprudence of the ICTY is a work in progress. The ICTY judges were initially elected for a four-year term that expired on 16 November 1997. Five of the sitting judges have been reelected, and six new judges have been elected,

commencing four-year terms on 17 November 1997. The duration of the ICTY is uncertain and dependent on budgetary approval by the United Nations General Assembly. Certainly, there is enough work to keep the ICTY fully employed beyond 2001. It is reasonable to assume that the ICTY jurisprudence will have an impact on the development of the law of armed conflict for some time to come, particularly as this jurisprudence is analyzed in foreign ministries, defense departments, and academic journals.

It is practicable to make preliminary assessments of what has happened to date. The various and continuing efforts of the several ICTY Chambers to grapple with the extreme complexity of the facts in the Yugoslav conflict(s) to determine the applicable law are, it is suggested, to be commended rather than criticized. The simplistic approaches of much scholarly writing in this area have produced convenient but essentially unreasoned solutions. For obvious reasons, no one raised the issue of whether or not World War II was a "war" in the trials following that conflict. Most contemporary conflicts do raise issues related to conflict classification, and these issues must be faced as long as the bodies of law applicable to international and internal conflicts differ in complexity and sophistication, as they do at present. The approach of the Appeals Chamber to elaborating upon customary law applicable to all conflicts, individual criminal responsibility for offenses committed in internal conflicts, and customary law in internal conflicts will have an enormous impact on the future jurisprudence of the ICTY. It may also, to the extent it is viewed as credible by outside observers, precipitate and contribute to a long-term trend toward the development of a uniform body of customary law applicable to all conflicts. The "two box" approach to the law of armed conflict for international and internal conflict is a viable teaching tool but presents substantial difficulties when applied to a refractory reality.

The work of the ICTY in elaborating upon the meaning and scope of crimes against humanity, command responsibility, the defense of duress, and the doctrine of reprisals has begun, but much remains to be done concerning these and other issues. It is unlikely that defendants in future cases will decline to raise the defense of legitimate reprisal when the single relevant decision to date has been made in a Rule 61 proceeding. It is also unlikely that defendants will decline to raise the defense of duress when the Appeals Chamber ruling in *Erdemović* has been so hotly contested. Further, bearing in mind the mixed civilian and military leadership roles of several of the accused now in custody, the ICTY will be compelled to assess the extent to which the doctrine of command responsibility applies to civilian leaders.



It is also reasonable to assume that the ICTY will make a substantial contribution to the law concerning the conduct of hostilities. Three observations are relevant in this regard. First, to the extent practicable, the ICTY OTP has paid due heed to the ruling of the Appeals Chamber in the *Tadić* Jurisdiction decision and has attempted to frame charges which are applicable to both international and internal armed conflicts. One example is Count 3 of the Amended Indictment against General Blaskić, which charges him with “an unenumerated Violation of the Laws or Customs of War, as recognized by Articles 3, 7(1) and 7(3) of the Statute of the Tribunal and Customary Law, Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II (unlawful attack on civilians).”<sup>64</sup> One potential result of this charging practice is that the Chambers will respond by developing substantially uniform standards for all forms of conflict.

Second, it is probable that the Chambers will consider for the first time charges such as inflicting terror on the civilian population. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited by both Article 51(2) of Protocol I and Article 13(2) of Protocol II. The dictionary defines terror as “extreme fear,” but many lawful acts in armed conflict cause extreme fear. The prohibition must, therefore, refer to unlawful acts or unlawful threats of violence, the primary purpose of which is to spread extreme fear among the civilian population. Threats to wipe out a city or to exterminate its population would be clear examples of prohibited threats. Whether or not unlawful acts do in fact spread terror among the civilian population can be determined by psychological evidence; whether or not the primary purpose of unlawful acts is to spread terror can be inferred from the circumstances. For example, conducting cat-and-mouse sniping against the civilians of a besieged city whereby some civilians would be attacked on a random basis and all civilians would be in a constant state of extreme fear would appear to be an example of a deliberate attempt to spread terror.

Third, it is possible that a body of law based on the uncodified concept of crimes against humanity will be developed in parallel with the existing law concerning the conduct of hostilities. It would be practicable to prosecute certain attacks against the enemy as crimes against humanity contrary to Article 5 of the Statute. The Report of the Secretary General discussing the ICTY Statute states in part that “crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.”<sup>65</sup> Although there is no

precedent for crimes against humanity charges related to attacks against the enemy, there would not appear to be any conceptual barrier against using such charges in appropriate circumstances. The most appropriate charges would appear to be under Article 5(a) for attacks where death occurs, and under Article 5(i) for other injuries including mental suffering. It would be essential to establish that the prohibited acts were committed as part of a widespread or systematic attack against a civilian population. If the ICTY does elaborate a body of law for the conduct of hostilities based on an imprecise concept of crimes against humanity and, at a minimum, independent of conflict classification, the relatively precise law of armed conflict may be shaken to its foundations.

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### Notes

These comments are made in a personal capacity and necessarily reflect neither the author's views in an official capacity nor the views of either the Office of the Prosecutor or the United Nations.

1. The ICTY Statute is contained in the Annex to the Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)), U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993), *reprinted in* 32 I.L.M. 1159 (1993). The language of the Statute itself is found at 32 I.L.M. 1192 (1993) [hereinafter ICTY Statute]. It was adopted unanimously by the Security Council at its 3217th meeting, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1203 (1993).

2. Security Council Resolution 955 Establishing the International Tribunal for Rwanda, Including the Statute of the Tribunal (1994), S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., art. 1, U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598 (1994) [hereinafter ITR Statute]. The ITR Statute was adopted by the Security Council on November 8, 1994, and is an Annex to Resolution 955.

3. As examples, the Trial Chamber *Decision on the Motion for Release by the Accused Slavko Dokmanović* (ICTY No. IT 95-13a-PT) issued on 22 October 1997 addresses the ICTY power of arrest, and the Appeals Chamber *Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997* (ICTY No. IT 95-14-AR 108bis) issued on 29 October 1997 addresses the ICTY power to issue orders to States and to State officials.

4. ICTY Fact Sheet January 19, 1998.

5. Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348-70 (1987), and Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, May 3, 1993, paras 35-37.

6. The Socialist Federal Republic of Yugoslavia (SFRY) ratified Geneva Conventions I-IV in 1950 and Additional Protocols I and II in 1979. The Federal Republic of Yugoslavia has acknowledged that it is bound by these agreements as a successor State. Croatia deposited a declaration of succession to Geneva Conventions I-IV and Additional Protocols I and II on May 11, 1992, and because of previous ratification by the SFRY, these instruments came into force for



Croatia retroactively on October 8, 1991, the date of Croatian independence. See International Committee of the Red Cross, Notification to the Governments of the States Parties to the Geneva Conventions of 12 August 1949 for the Protection of War Victims: Succession of Croatia, July 9, 1992 (on file with author). Bosnia-Herzegovina deposited a declaration of succession to Geneva Conventions I–IV and Additional Protocols I and II on December 31, 1992, and because of previous ratification by the SFRY, these instruments came into force retroactively on March 6, 1992, the date of Bosnian independence. See International Committee of the Red Cross, Notification to the Governments of the States Parties to the Geneva Conventions of 12 August 1949 for the Protection of War Victims: Succession of Bosnia-Herzegovina, Feb. 17, 1993 (on file with author).

7. Croatia has entered into the following agreements: (a) a Declaration of Respect for International Humanitarian Law at the Hague on November 5, 1991 (Presidents of all six republics of the former Yugoslavia made the same declaration); (b) a memorandum of Understanding with the SFRY on November 27, 1991 in Geneva; (c) a Set of Rules of Procedures and a Plan of Operation for a Joint Commission to Trace Missing Persons and Mortal Remains, signed in Pecs, Hungary, with the SFRY on December 16, 1991, pursuant to the November 27, 1991, MOU; (d) an Addendum to the November 27, 1991, MOU signed in Geneva on May 23, 1992, with the Federal Republic of Yugoslavia (FRY); and (e) an Agreement on Release and Repatriation of Prisoners signed in Budapest on August 7, 1992, and concluded in the framework of the November 27, 1991, MOU and the May 23, 1992, Addendum to the MOU.

Bosnia-Herzegovina has entered into the following agreements: (a) a Declaration of Respect for International Humanitarian Law at the Hague on November 5, 1991 (Presidents of all six republics of the former Yugoslavia made the same declaration); (b) an Agreement under common Article 3 of the Geneva Conventions signed in Geneva on May 22, 1992, by representatives of the President of Bosnia-Herzegovina (Izetbegovic), the President of the Serbian Democratic Party (Karadzic), the President of the Croatian Democratic Community (Bikic), and the President of the Party of Democratic Action (Izetbegovic again); (c) an Agreement to implement the May 22, 1992, agreement signed in Geneva on May 23, 1992, and involving representatives of the same groups; (d) an Agreement to establish the Bosnia-Herzegovina ICRC Plan of Action following the May 22, 1992, agreement signed in Geneva on June 6, 1992, by representatives of the President of Bosnia-Herzegovina, the President of the Serbian Democratic Party, and the President of the Croatian Democratic Community (the representative of the President of the Party of Democratic Action was not able to attend the meeting and was not invited to ratify the agreement); (e) a Programme of Action on Humanitarian Issues Agreed between the Co-Chairman to the London Conference on August 27, 1992, and the Parties to the conflict, signed on separate but identical documents by Radovan Karadzic, by Alija Izetbegovic (who indicated in handwriting that he was signing as President of the Republic of Bosnia-Herzegovina), and by Mate Boban; and (f) an Agreement on the Release of Transfer of Prisoners signed in Geneva on October 1, 1992, on the basis of the agreement of May 22, 1992, by representatives of the President of the Republic of Bosnia-Herzegovina, the President of the Serbian Democratic Party, the President of the Croatian Community, and the Party of Democratic Action.

8. In re Dusko Tadić: Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (The Prosecutor v. Dusko Tadić), 1995 I.C.T.Y. No. IT-94-1-AR72 (Oct. 2), *majority decision reprinted in* 35 I.L.M. 32 (1996) [hereinafter Jurisdiction Decision].



9. In re Dusko Tadić: Defence Brief to Support the Motion on the Jurisdiction of the Tribunal (The Prosecutor v. Dusko Tadić), 1995 I.C.T.Y. No. IT-94-I (June 23), at 11-12 [hereinafter Defence Brief].
10. In re Dusko Tadić: Response to the Motion of the Defence on the Jurisdiction of the Tribunal (The Prosecutor v. Dusko Tadić), 1995 I.C.T.Y. No. IT-94-I (July 7), at 36-46 [hereinafter Response Brief].
11. In re Dusko Tadić: Amicus Curiae Brief Presented By the Government of the United States of America (The Prosecutor v. Dusko Tadić), 1995 I.C.T.Y. No. IT-94-I (July 17), at 25-36.
12. In re Dusko Tadić: Prosecution Response to the Defence Interlocutory Appeal Brief (The Prosecutor v. Dusko Tadić), I.C.T.Y. No. IT-94-I, (Sept. 1), at 2-13.
13. Jurisdiction Decision, *supra* note 8, para. 77, at 57.
14. *Id.*, para. 84, at 60.
15. *Id.*, para. 76.
16. *Id.*, para. 85, at 60, paras. 143-44, at 73.
17. Jurisdiction Decision, *supra* note 8, at 6 (separate opinion of Judge Abi-Saab).
18. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian law Committed in the Territory of the former Yugoslavia since 1991, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.11, July 25, 1997. Rule 61 addresses the procedure to be followed in case of failure to execute a warrant and provides for an *ex parte* proceeding before one of the trial chambers, during which the prosecutor presents some of the evidence in the case and attempts to have the indictment reconfirmed. As there is no finding of guilt or innocence, it is not a trial *in absentia*.
19. Prosecutor v. Ivica Rajić Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, I.C.T.Y. No. IT-95-12-R61, Sept. 13, 1996.
20. Prosecutor v. Dusko Tadić, Opinion and Judgment, I.C.T.Y. No. IT-94-I-T 7 (May 1997) (hereinafter Tadić Trial Decision).
21. Military and Paramilitary Activities in and against Nicaragua (Nic. v. U.S.), Merits, Judgment, 1986 I.C.J. Reports 14.
22. *Supra* note 20, paras 118-20, 569.
23. *Id.*, para 584.
24. *Supra* note 21, para 115 (emphasis added).
25. *Supra* note 8, para 586.
26. *Id.*, para 587.
27. *Id.*, paras 607-08.
28. *Supra* note 21, Sep. Op. Judge Ago, para. 16 (emphasis added).
29. Brief of Argument of the Prosecution (Cross-Appellant) The Prosecutor v. Dusko Tadić I.C.T.Y. No. IT-94-I-A (Jan. 12, 1998), at 5-45.
30. *Id.* at 13-30.
31. Defence Brief, *supra* note 9, at 12.
32. Response Brief, *supra* note 10, at 47-53.
33. Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 53 (1974-75).
34. See Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art 146.
35. MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS 620 (1982).
36. See, e.g., Peter Rowe, *War Crimes and the Former Yugoslavia: The Legal Difficulties*, 32 MIL. L. & L. WAR REV. 317, 331-33 (1993); Daphna Shrag & Ralph Zacklin, *The International*

*Criminal Tribunal for the Former Yugoslavia*, 5 EUR. J. INT'L L. 360, 366 (1994); Frits Kalshoven, Paper Prepared for Symposium on the International Criminal Tribunal for Former Yugoslavia, The Hague (Feb. 16, 1995) (unpublished manuscript).

37. Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, 1995 I.C.J. 75 (CR 95/34) (Nov. 15) (Verbatim Record).

38. *Id.* at 77.

39. *Id.* at 79.

40. *Supra* note 21, at para 218, citing *Corfu Channel*, Merits, 1949 I.C.J. Rep. 22.

41. Judgment, I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 171, 253–54 (1947) [hereinafter *Nuremberg Judgment*].

42. The Judgment of the Tribunal (in The German High Command Trial), 12 LAW REPORTS OF TRIALS OF WAR CRIMINALS 59, 86–94 (1949).

43. *Supra* note 21.

44. Meron, *supra* note 5, at 361.

45. Charter of the International Military Tribunal, art. 6(c), in THE LAWS OF ARMED CONFLICT 911, 913–14 (Dietrich Schindler & Jiri Toman eds., 3rd ed. 1988) [hereinafter *Nuremberg Charter*].

46. *Nuremberg Judgment*, *supra* note 41, at 254–55.

47. Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, Dec. 20, 1945, in HOWARD S. LEVIE, *TERRORISM IN WAR: THE LAW OF WAR CRIMES* 558, 558–62 (1993).

48. *Nuremberg Charter*, *supra* note 45, art. 6(c).

49. The Tribunals in the *Einsatzgruppen Case* and the *Justice Case* decided no link with armed conflict is necessary. See LEVIE, *supra* note 47, at 395–99. The Tribunals in the *Flick Case* and the *Ministries Case* decided otherwise. See *id.* at 399.

50. Defence Brief, *supra* note 9, at 12–13.

51. Jurisdiction Decision, *supra* note 8, paras. 72, 138–42.

52. *Supra* note 29, at 59–66.

53. *Id.* at 67–77.

54. Defence Motion in *Limine* Regarding Mens Rea Required for Charges Alleging Command Responsibility and for Bill of Particulars re Command Responsibility Portion of Indictment, Prosecutor v. Tihomir Blaskić, I.C.T.Y. Case No. IT-95-14-T, filed Dec. 4, 1996.

55. Response of the Prosecutor to the Defence Motion in *Limine* Regarding Mens Rea for Charges Alleging Command Responsibility and for Bill of Particulars re Command Responsibility Portions of the Indictment, Prosecutor v. Tihomir Blaskić, I.C.T.Y. Case No. IT-95-14-T, filed Jan. 20, 1997.

56. Decision Rejecting the Defence Motion in *Limine* Regarding Mens Rea Required for Charges Alleging Command Responsibility and for Bill of Particulars re Command Responsibility Portions of the Indictment, Prosecutor v. Tihomir Blaskić, I.C.T.Y. Case No. IT-95-14-T, filed Apr. 4, 1997.

57. Decision on the Defence Motion to Strike Portions of the Amended Indictment Alleging “Failure to Punish” Liability, Prosecutor v. Tihomir Blaskić, I.C.T.Y. Case No. IT-95-14-T, Apr. 4, 1997, para 9.

58. Sentencing Judgment, The Prosecutor v. Drazen Erdemović, I.C.T.Y. Case No. IT-96-22-T, Nov. 29, 1996, para 10.

59. Judgment of the Appeals Chamber, Prosecutor v. Drazen Erdemović, I.C.T.Y. Case No. IT-96-22-A, Oct. 7, 1997, para 19.

60. FRITS KALSHOVEN, *BELLIGERENT REPRISALS* (1971); Frits Kalshoven, *Belligerent Reprisals Revisited*, 21 NETH. Y.B. INT'L L. 43 (1990).

61. G.A. Res. 2675, U.N. GAOR 25th Sess., Supp. No. 28, U.N. Doc A/8028 (1996).

62. Brief on the Applicable Law for Rule 61 Hearing, Prosecutor v. Milan Martić, I.C.T.Y. Case No. IT-95-11 (1996).

63. Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Prosecutor v. Milan Martić, I.C.T.Y. Case No. IT-95-11-R61, Mar. 13, 1996.

64. Amended Indictment, Prosecutor of the Tribunal v. Tihomir Blaskić, I.C.T.Y. Case No. IT-95-14-T, Nov. 15, 1996.

65. SG Report, *supra*, note 5, para 48.





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# **The Role of Individuals in International Humanitarian Law and Challenges for States in Its Development**

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Dieter Fleck

**A** CENTURY AGO, ADMIRAL CHARLES H. STOCKTON prepared a U.S. Naval War Code which was approved by President McKinley in June 1900 but was revoked four years later after certain concerns were expressed by foreign governments. While it appears that the episode would deserve a historical study evaluating the significance of this particular code both for training Navy officers at the time and for later similar efforts, the more general question of the role of individuals in international humanitarian law appears worth being reflected upon in a study honoring Charles Stockton. What is the role of individuals in international law? To what extent are individuals bearers of international legal rights and obligations? What is their role as actors in the progressive development of that law?

Not surprisingly, different answers to these complex questions have been considered over time, and they remain rather controversial. As Karl Josef Partsch concluded in 1985, it is difficult to formulate a thesis in this respect

which both reflects a general consensus among writers and conforms with State practice. He also expressed doubts whether the increased concern for the protection of human rights during the last decades has led to a transformation of the legal position of the individual.<sup>1</sup> Indeed, the central role of States as sovereign subjects of international law has not changed very much throughout this century. But political efforts to ensure protection of the individual and the non-governmental, as well as governmental, international organizations working to this end have gained considerable influence. It is significant that practical aspects in the wider field of human rights and public opinion in many quarters have increasingly challenged more traditional views of international law as a whole, thus underlining the rights of individuals which all States must respect and protect.

The aims of this study are to describe the role of the individual in the ongoing evolution of international humanitarian law as a result of both factual and policy developments, assess certain deficiencies of existing conventional law, and develop various methodological considerations regarding international law-making for military operations. Conclusions to be drawn from these thoughts may affect the work of policy makers, legal practitioners, and academic lawyers alike.

### Evolution of International Humanitarian Law

Rights and obligations of individuals vis-à-vis their government have been postulated since long before our present age. The specific question of whether the Sovereign has an international obligation to observe the ordinary laws of war even toward rebellious subjects who openly take up arms against him had already surfaced by the eighteenth century.<sup>2</sup> Individuals were not seen as *subjects* of international law, a role that has been reserved for States since early times. But characterizing human beings as pure *objects* of international law has never been a convincing conclusion either. The subject-object dichotomy appears hardly appropriate in an area where legal protection of individuals is of topical importance.<sup>3</sup>

The rapid factual development during the present century has added additional arguments: national sovereignty is challenged today by the end of the Cold War, failed processes of modernization, and still-existing burdens inherited from colonialism. There is, indeed, a need for global response to existing security risks. Acts of terrorism, drug abuse, problems of migration, and environmental protection require combined efforts which States today cannot successfully perform except in cooperation with other States,

international organizations, and even individuals. Challenged to deal with security matters in a broader sense, States and societies are called upon to make new efforts in order to overcome practical inabilities in the implementation of shared principles. New ideas, attitudes, and resources have to be developed jointly to ensure economic well-being and to meet environmental risks. The challenges of our present information age require long-term attitudes based on technological skills not always available within existing State establishments, thus calling for increased cooperation between government agencies, private companies, and individuals.

A distinct international interest on the part of national parliaments in a growing number of democratic States today very significantly affects effort taken on a global scale. Widely shared political concerns (in some States even constitutional constraints) are relevant for parliamentary decision-making regarding the use of military power. But there is also an increasing role for human rights considerations, in calling for responsible action towards gross violations in other States. National parliaments are increasingly involved in international relations. They pass legislation regulating the sending of their military forces abroad and the long-term or short-term stationing of foreign forces on their own territory. Members of national parliaments participate in international conferences and are important interlocutors for official visitors from foreign States. Parliamentary debates are often used to articulate a political interest in developments within other countries.

Human rights violations are typical fields of legitimate interference in matters of general concern which today cannot be left to the domestic jurisdiction of a particular State. State sovereignty at the end of this century is no longer the same as it was at its beginning. These trends also reveal evolving restraints in State immunity law, restraints which deserve thorough evaluation from both national and international legal perspectives.

The present evolution of humanitarian law may be described as an evolution of terms. The term *armed conflict*, which for a long time was not considered very different from a war between States (whether formerly declared or factually started), has now more or less evolved in meaning vis-à-vis its international character. By far, most armed conflicts today are non-international. Very much to be deplored, this development has not led to a decrease in cruelty on the battlefield. The extent of suffering in non-international armed conflicts calls for an international response. The term *humanitarian protection* has undergone a similar development. It was first used to indicate protection granted by States, on issues limited by strict adherence to the principle of non-interference in the political affairs of other States. But there is hardly any objection today to



application of this term in a broader sense, including the right to intervene for humanitarian purposes against policy positions taken by other States. It also encompasses the activities of non-governmental organizations (NGOs), and even individuals, to ensure and strengthen human rights protection. This change inevitably leads to a new notion of *international law*, which is no longer confined to the conduct of States in their mutual relationships but now extends to individual human rights and to the global commitments of States not only to respect but also to ensure respect for the protection of victims of human rights violations.

In 1899 and 1907 the Hague Peace Conferences took decisive steps, first by incorporating the obligation to issue instructions to the armed forces on the laws and customs of war on land (Article 1 of Hague Convention IV), and later by providing that a belligerent party which violates these regulations shall be responsible for all acts committed by its armed forces and liable to pay compensation (Article 3 of Hague Convention IV).

After World War I there were but weak attempts to develop individual criminal responsibility under international law.<sup>4</sup> However, individual rights were stressed and developed in various domains. The concept of the protection of minorities, provided for in several peace treaties and special conventions connected therewith, generated a new attitude of conflict management in certain States which had either gained their independence or whose territory was otherwise affected by the results of the war. Although the great powers effectively rejected any effort to extend this protection to minorities in other States, the underlying legal principles influenced the Declaration on the International Rights of Man adopted by the Institut de Droit International in 1929.<sup>5</sup> The concept of self-determination, developed by President Woodrow Wilson, constituted the basis for the protection of non-self-governing territories under the League of Nations mandate system. For the first time, the protection of refugees under international law was implemented in a multinational framework. Last, but not least, the Geneva Conventions of 1929 considerably improved the condition of the wounded and sick in armies in the field, as well as the treatment of prisoners of war.

No effort was made at that time to enact individual responsibility of either political or military leaders or those executing orders. But acts of genocide, war crimes, and crimes against humanity committed in World War II mobilized the international community to take at least the first steps to close this gap. The Genocide Convention of 1948 defined *genocide* as a crime under international law and introduced an obligation to try or extradite persons charged with this crime. It provides that competence rests with national tribunals of the State in

the territory of which the act was committed, or "such international penal tribunal as may have jurisdiction" (Article VI). The obligation under the Geneva Conventions of 1949 to punish or extradite persons who have committed grave breaches of humanitarian law was similarly based on the idea of national jurisdiction. The same applies to penal and disciplinary sanctions under Article 28 of the Cultural Property Convention of 1954. Nevertheless, these instruments effectively introduced the principle of individual responsibility for war crimes and crimes against humanity into conventional law, thus confirming the conclusion of the Nuremberg Tribunal that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."<sup>6</sup>

While the idea of individual responsibility under international law has developed considerably during this century, there is still a reluctance to accept corresponding rights of the individual, rights based on international legal rules and given teeth by specific remedies against one's own, as well as foreign, States. Current State practice normally limits legal remedies to strict rules under existing national law. Arguments based on international law are hardly of importance to national jurisdiction. Where the question of remedies for violation of rights based on international law is raised, it is as a matter of principle not for the individual owner of such rights to take effective action, but rather the State of which he or she is a national.

The Third Geneva Convention of 1949 was one of the first international instruments to establish an individual right corresponding to the idea of individual responsibility. According to its Article 109, paragraph 3, no sick or injured prisoner of war may be repatriated against his will during hostilities. This right was further developed by the evolving practice of ensuring each prisoner of war the right to refuse repatriation at the end of an armed conflict, if he so chooses, and the right to have a private interview with an ICRC (International Committee of the Red Cross) official to confirm that his decision was made freely and without coercion.

The 1977 Additional Protocols did not further develop those individual rights, except to provide fundamental legal guarantees to be granted within the relevant national system (Article 75 of Protocol I) and a right to refuse surgical operation (Article 11). In human rights conventions, however, a decisive step was taken to strengthen the rights of individual persons. The 1966 Optional Protocol to the International Covenant on Civil and Political Rights provides that a State may recognize the competence of the Committee of Human Rights to receive and consider communications from individuals subject to its



jurisdiction who claim to be victims of a violation by that State of any of the rights enumerated in the Covenant, provided they have exhausted all available domestic remedies. Likewise, the 1984 Torture Convention introduced the option for a State to accept the competence of the International Committee against Torture to investigate complaints by individuals falling under the jurisdiction of that particular State.

Even in the absence of legal remedies, individuals may claim collective rights, e.g., the right of self-determination as confirmed in Article 1(2) of the UN Charter and common Article 1(1) of the 1966 Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights. There is some sense, therefore, in assuming that respect for this right is an *erga omnes* obligation binding all States and owed to the international community as a whole. The right of self-determination cannot be limited to the peoples of existing States; otherwise, there would be no self-determination beyond a closed and often very arbitrary system which in itself provides the basis for demands for change. There is, however, no consensus on the present legal prerequisites for claiming a right of self-determination. The liquidation of former European colonial regimes might be least controversial today. The United Nations has outlawed colonialism, and all relevant decisions can be effectively based on Chapters XI–XIII of the UN Charter. The right of self-determination may also be used to support efforts to restore sovereignty in territories where it has been illegally denied in recent times. In situations, however, which are characterized by neither colonialism nor illegal occupation, any recourse to the right of self-determination remains highly controversial. There is no right of separation from well-established States. An exception to this rule may be the fact that serious human rights violations could generate a right of separation as a last resort.<sup>7</sup> Consensus on this issue will remain difficult to achieve. It is no surprise that acceptance of the right of self-determination in the international community tends to increase proportionally with the distance from actual events.

Within the Organization on Security and Cooperation in Europe (OSCE) process, the significance of the human dimension was stressed by the third basket of the Helsinki Final Act of August 1, 1975, and more specifically during the meetings held in 1989 (Vienna), 1990 (Copenhagen), and 1991 (Cracow, Geneva, and Moscow). It remains to be seen, however, whether this process may lead to the creation of new individual rights which go beyond a strengthening of existing commitments under the International Covenant on Civil and Political Rights of 1966 and the European Convention on Human Rights and Fundamental Freedoms of 1950. The International Helsinki



Federation, in its 1997 Report, stated that human rights violations had been, and were still being, committed in thirty-two of the fifty-four OSCE member States; yet, there is no effective international mechanism to examine such allegations or to ensure that appropriate remedies are available in the interest of the victims.

In accordance with the jurisdiction of the Court of Justice of the European Communities, any citizen of the European Union has a right to see the law determining his or her position respected by Community institutions, as well as member States.<sup>8</sup> This right, and the corresponding remedies under European Union law, is comparable to national legal guarantees granted by a State to its citizens. Such guarantees cannot be expected to become part of global international law in the foreseeable future.

In a recent systematic study of the rights and obligations of individuals as subjects of international humanitarian law, George Aldrich has assessed the existing individual criminal responsibility under international law for war crimes, genocide, and crimes against peace, in the framework of possible individual rights corresponding to individual obligations.<sup>9</sup> He very convincingly stresses that the latter are much less developed than the former. In this context, he has coined the term "imperfect right" to describe a situation where (1) legal rights of an individual have been violated, (2) the individual perpetrator is subject to criminal punishment as a result, and (3) the perpetrator, as well as his State, may at least theoretically be liable for damages. While individual remedies are available only in exceptional cases, individual claims remain widely dependent upon protection by the State concerned, and the latter is alone authorized to put such claims forward, or even waive them at the expense of those whose rights have been violated.

The extent to which attempts to solve this situation are realistic is debatable. International cooperation is regularly developed without the benefits of law courts, without sanctions protecting the owner of specific rights against violations, and without a full-fledged system of reparations. Disputes can very often be settled only through negotiations on the basis of formal equality, without recourse to higher authorities. Where reparations can be achieved, they often tend to remain rather symbolic.

Yet the role of legal arguments in such cooperation should not be underestimated. Legal positions are of importance, irrespective of the opportunity for enforcing their implementation. Even symbolic acts of reparation may have relevance for the participants as part of psychological or historical *Vergangenheitsbewältigung*. The dissuasive role of legal reasoning may

add to the significance of such activities in avoiding possible claims as much as in settling existing ones.

The evolution of law is a complex process, influenced by many players and dependent on various different sources. This is particularly true for international law, with all its imperfections. Efforts to overcome deficiencies in this area require patience and a good sense of proportion. It is in this spirit that existing gaps in existing international law ought to be assessed.

### **Deficiencies of Existing Conventional Law**

At the present stage of legal development, it is no longer possible, as a matter of positive law, to regard States as the only subjects of international law.<sup>10</sup> However, there are a number of deficiencies which make it difficult for individuals either to exercise rights not deriving from their national legal system against their own State or to exercise rights against foreign States without the support of their own government acting on their behalf.

The most important deficiency of international humanitarian law as laid down in existing conventions and agreements is its limited scope of applicability. Designed for armed conflicts of an international character, most of these rules do not formally apply to non-international armed conflicts. In an effort to secure minimum rules in such conflicts, common Article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocol II have underlined the legal difference between international and non-international armed conflicts in a rather rudimentary way. If these provisions were understood as limiting legal protection in non-international conflicts to an enumerative set of minimum rules, they would have to be considered as counterproductive in the interest of individual victims. Such a perception would be in strong contradiction to undeniable requirements of reality on the battlefield and would run counter to widely accepted principles of the rule of law. An excessively restrictive observance of the difference between international and non-international armed conflicts in State practice would evidence a two-book mentality unlikely to find any support in public opinion. There are but few armed forces, however, which have formally abolished such double standards by following an official policy of compliance with the full body of rules of international humanitarian law during non-international conflicts.<sup>11</sup> Corresponding recommendations developed at the international level have not been implemented as widely as one would wish.<sup>12</sup> The fact that such a policy serves not only humanitarian interests but also operational requirements has been stressed by experts;<sup>13</sup> nonetheless, widespread ignorance of it remains.



Yet concrete results have never been fully investigated by legal and operational experts. The degree to which rules of international armed conflict are tailored to police-type operations in different levels of crisis during non-international conflicts may also be a matter of dispute. The use of the shotgun and tear gas, which must be seriously questioned during armed conflicts, was never prohibited for police operations, although the three general principles underlying the law of armed conflict are fully relevant to police operations: that the use of force is permissible only if it is directed against legitimate targets, it is prohibited to cause unnecessary suffering, and perfidious acts are unlawful. The relevance of armed conflict law for military operations other than war needs to be studied in further detail. While interdisciplinary efforts to this effect would seem appropriate, and though the role of operational experts cannot be underestimated, it should not be overlooked that legal and policy considerations will often be decisive when balanced against factual and operational considerations.

A further deficiency of international humanitarian law remains the large number of breaches of its existing rules. The problem is not unique to this field of law; it also applies to certain parts of national law, such as traffic law, taxation, customs, or environmental provisions. Though it would appear inappropriate to draw comparisons between these very different areas of legal regulation, one possible common conclusion may be that frequent violations do not necessarily amount to complete disregard of the law. Nevertheless, the need to further develop sanctions and foster dissemination of particular rules must be underlined.

Objective fact-finding, so essential for effective law enforcement, is difficult to achieve. The Commission established under Article 90 of the 1977 Protocol I Additional to the Geneva Conventions to investigate allegations of serious violations of the Conventions and of the Protocol has not yet been given a single chance to provide its services. This is the case even though a growing number of States have recognized its competence and despite the fact that it is designed to work without publicity so as to avoid publicly offending States and to facilitate diplomatic solutions. There is no effective international jurisdiction at a global scale for adjudicating claims for violations of humanitarian law. The national jurisdiction of the author State is in many cases not sufficient. As far as the national jurisdiction of third States is concerned, the act of State doctrine still provides for sovereign immunity of the author State for *acta iure imperii*, with no exception for serious human rights violations.



Given this situation, the issue of whether claims brought before the courts of the author State may be based on national or international law is less relevant. It may be noted, however, that the German Federal Constitutional Court has held that no general rule of international law excludes individual claims for acts or omissions of a foreign State committed during a war.<sup>14</sup> The Court saw, in principle, parallel remedies for individuals and States, but it also underlined the fact that individual claims may be expressly excluded by peace treaties and similar treaties, such as the London Agreement on German External Debts of February 27, 1953.<sup>15</sup>

Rights of the individual are decisively expressed by the manner and extent to which claims may be pursued; legal remedies to receive reparation (in terms of restitution or compensation) are still very imperfect. Full reparation can hardly be achieved in cases involving violations of humanitarian law. In this respect, pecuniary harm should not obscure the importance of reparation for emotional and moral damage. Legal restitution in terms of criminal sanctions had important psychological reparation effects for raped women in the former Yugoslavia, even where financial payments were impossible or unrealistic. The work of the Truth Commission in South Africa, which leads to a lump sum payment of no more than two thousand Rand (U.S. \$400) to each of twenty-two thousand victims of the apartheid regime, irrespective of the amount and degree of suffering, nevertheless has had the effect of restoring individual confidence in the rule of law in situations where adequate payment of damages is impossible or not expected.

These few examples may suffice to support the thesis that no system of individual claims could be considered sufficient for systematic and massive violations of legal principles and rules. Even States trying in the most diligent manner to arrange for reparations have failed to cope with the extent of cruelty of which humankind is capable.

The imperfect state of international humanitarian law implementation reflects a situation common to many areas of international law, one that may be best influenced by personal activities within governments, non-governmental organizations, and by the public.<sup>16</sup> This deficiency also offers opportunities for an active role by the individual, given that all implementation work depends on human activities at various levels of the State and on the willingness and ability of State officials to cooperate with non-governmental organizations and private citizens.

The role of individuals may also be affected by challenges to the law of neutrality during the present period of rapid development in the law. Both the Hague Peace Conferences prior to World War I and the development of the

Geneva Conventions are important examples of the role of neutral States in supporting the implementation and further development of humanitarian rules. The responsibility of neutral States to develop the law protecting individuals in the future is also evident.<sup>17</sup>

In failing States—which remain subjects of international law but, due to their lack of capacity to act, are exempt from responsibility under international law—even fundamental individual rights are unprotected. Failing States are characterized by total dissolution of order as a consequence of internal development and the absence of an effective negotiating partner vis-à-vis the international community. Although direct criminal responsibility of individuals exists, and criminal jurisdiction can be exercised by third States and competent international tribunals, individual claims would appear unrealistic under such conditions.<sup>18</sup>

### Considerations for International Law-Making

It is particularly difficult to assess possibilities for international law-making in areas relating to military operations. States tend to stress the ad hoc significance of such operations. Even in cases in which military forces are operating in implementation of Security Council resolutions, it is not beyond dispute which body of law—that of armed conflict or law of peacetime operations—is properly applicable. This might explain the reluctance to acknowledge a need to develop further the rules, especially in a systematic manner. Furthermore, there are both general and specific obstacles to developing new conventional law in this area. *Opinio iuris*, a prerequisite for law creation (not only in the context of customary law), is only slowly, and often rather vaguely, shaped by public opinion and State practice.

A cautious attitude towards conventional law creation is also suggested by recent developments. The most important example remains the experience with the 1977 Protocols Additional to the Geneva Conventions. It took considerable time, despite the presence of the ICRC as an effective and professional promoter of that law, to establish the consensus necessary to reach the stage of signature in 1977, and even more so to carry the effort through to ratification (now in more than 140 States). In each case, ratification was based on national decisions, formally closed to international coordination—although nevertheless subject to a certain extent to outside influences.

The lesson which may be gleaned from the 1980 Convention on Certain Conventional Weapons is not very different. Developed as a side-result of the negotiations on the 1977 Protocols, the 1980 Convention was at first limited to



a prohibition of particular means and methods of combat that were of no distinct operational importance.<sup>19</sup> The number of States parties to this Convention remained considerably low until the First Review Conference in 1995 when the new Protocol IV on Blinding Laser Weapons of October 13, 1995, was added, a remarkable, although limited, step towards new conventional rules. The revision of Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps, and Other Devices on May 3, 1996, was an even more important second step, one supported by the international campaign against land mines. In this respect, the concerted efforts of many energetic players and the overwhelming evidence of excessive civilian casualties in more than a hundred States mobilized public opinion and soon led a considerable number of governments to change their position as to the desirability and extent of a prohibition. At the same time, this exceptional campaign illustrated that the creation of conventional law is uncertain even in the face of overwhelming public expectations. Successful efforts to prohibit certain uses of anti-personnel land mines have not been accompanied in all quarters by equally effective efforts toward a prohibition of production, stockpiling, and sale. Thus, the new Convention on the Prohibition of Landmines, which was opened for signature in Ottawa on December 3, 1997, did not gain the same initial support as the revised Protocol II in 1996. Furthermore, individual rights have not been stipulated in this context; the issue, however, may well be taken up later.

Political commitments and a policy of "soft law" implementation in some States may facilitate such trends. But they cannot substitute for a solid and often cumbersome process of creating conventional legal rules based on reciprocity, careful implementation of existing law, and the exercise of sanctions against breaches.

The relevant UN policy is still uncertain in many respects. While individual human rights were first addressed in the Charter and international instruments developed under the auspices of the World Organization, many solutions have remained rather erratic. New legal provisions remain subject to the political will of governments. Proposals developed within the United Nations Secretariat have to cope with this reality. Yet the responsibility of, and opportunities for, the UN to influence legal perceptions by offering relevant information and developing appropriate proposals should not be underestimated; they should be given full support by the member States.

An important example in this respect is the 1994 Convention on the Safety of United Nations and Associated Personnel. Efforts to prepare this new convention did not go as far as consolidating and codifying international rules



suggested by the Secretary-General.<sup>20</sup> The Convention contains a few articles on certain fundamental obligations of States, balanced by provisions on the relevant obligations of such personnel. The solution found is not free from gaps and uncertainties. It is based on a considerable misunderstanding that Article 2(2) of the Convention excludes UN operations authorized by the Security Council as enforcement actions under Chapter VII "in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies." Enforcement actions under Chapter VII should never be, and hence never be misinterpreted as, armed conflicts between the military forces involved. Rather, UN forces must be respected as enjoying immunity under Article 105 of the Charter and the general terms of the 1946 Convention on Privileges and Immunities of the United Nations. Their members may not be taken as prisoners of war; in the event they are detained, it would be absurd to suggest they should not be released before "the cessation of active hostilities" in accordance with Article 118(1) of the Third Geneva Convention, the accepted rule for combatants in armed conflicts. Thus, the 1994 Convention does not meet important requirements of peace enforcement which led to its development.<sup>21</sup>

More successful, though considerably more controversial and time consuming, were efforts to establish the International Criminal Court (ICC). After several decades of discussion in various fora, this idea is now supported by the global consensus on the urgent need to establish the ad hoc tribunals for the former Yugoslavia and for Rwanda. A conference of States will be convened in 1998 to prepare the legal basis of the ICC in more concrete terms than ever before. The competence of the ICC will be limited to acts of genocide, crimes against humanity, war crimes, and wars of aggression. Its jurisdiction will be subsidiary; only cases that cannot be adjudicated by national courts because they are unable or unwilling to restore justice shall be brought to the International Tribunal. In this context, the extent to which a State Party to the planned ICC Statute may have to modify its national laws (e.g., concerning extradition of nationals) remains to be clarified.<sup>22</sup> Jurisdiction over command responsibility issues will remain a complex subject.<sup>23</sup> Major efforts will be required to introduce rules of procedure that are not included in the statute, subject to further experience of the ICC. In this respect, the development of international rules of evidence will be of key importance.<sup>24</sup>

Once established, the permanent International Criminal Tribunal will be a great step forward to ensuring the rule of law as a prerequisite for internal security, social stability, and peaceful development. It will support justice

where national judicial organs are failing. To build confidence on the part of the victims, to ensure legal balance, and avoid creating perceptions of victors' justice, a permanent international court is preferable to any ad hoc tribunal. The relationship between national and international jurisdiction should, however, be assessed in greater detail. Under what constraints should a State extradite its own nationals? Moreover, when should it extradite its own military personnel, who are subject to particular national order and discipline, and accountable to the highest political leadership? Are there limits to the *ne bis in idem* rule in cases where a national court has issued a sentence that at the international level might be considered too mild in comparison? How should cooperation between international and national judicial organs be developed?

A thorough reassessment also appears to be necessary on the issue of individual claims. The ILC Draft Articles on State Responsibility, adopted in 1996, did not mention the individual as a bearer of rights and obligations at all.<sup>25</sup> Its Article 40 offers a very broad definition of the injured State, including even infringements of rights arising from a multilateral treaty or rules of customary international law in third States, anywhere on the globe, if it is established that "the right has been created or is established for the protection of human rights and fundamental freedoms." Thus, human rights violations in any part of the world would allow any State to consider itself as injured and entitled under Article 42 of the draft "to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination." Hardly any State, however, will defend claims of citizens of third States. If the individual victim himself could put claims forward against the author State and base his claim on international law rather than the national law of that State, reparations might be more effective.

An excellent example of an expert proposal compiled in international cooperation to support lawmaking by States is the revised set of Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law prepared by Theo van Boven as Special Rapporteur of the UN Commission on Human Rights.<sup>26</sup> It starts from the principle that every State has the duty to respect, and to ensure respect for, human rights and humanitarian law. This obligation includes the duty to prevent violations, investigate violations, take appropriate action against violators, and afford remedies and reparation to victims. As stipulated by the Special Rapporteur, every State shall ensure that adequate legal or other appropriate remedies are available to any person claiming that his or her rights



have been violated. Reparation may be claimed by the direct victims or their immediate family. It includes restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. Restitution, which is designed to reestablish the situation that existed prior to the violations, shall include restoration of liberty, family life, citizenship, return to one's place of residence, and use of property. Compensation shall be provided for any pecuniarily assessable damage resulting from violations of human rights and humanitarian law, such as physical or mental harm, (including pain, suffering, and emotional distress) and lost opportunities (including education, material damages, and loss of earnings—including in turn loss of earning potential, harm to reputation or dignity, and costs required for legal or expert assistance). Rehabilitation shall be provided, and it will include medical and psychological care as well as legal and social services. Satisfaction and guarantees of non-repetition shall be provided, including, as necessary, cessation of continuing violations, verification of the facts and full and public disclosure of the truth; an official declaration or a judicial decision restoring the dignity, reputation, and legal rights of the persons connected with the victim; an apology, including public acknowledgement of the facts and acceptance of responsibility; judicial or administrative sanctions against persons responsible for the violations; commemorations and tributes to the victims; inclusion in human rights training and in history textbooks of an accurate account of the violations committed in the field of human rights and humanitarian law; and preventing the recurrence of violations—by such means as ensuring effective civilian control of military and security forces, restricting the jurisdiction of military tribunals to only specifically military offenses committed by members of the armed forces, strengthening the independence of the judiciary, protecting the legal profession and human rights defenders, and improving, on a priority basis, human rights training for all sectors of society, in particular for military and security forces, as well as for law enforcement officials.

Acceptance of these draft principles and guidelines would progressively develop existing international law, which is still very far from providing full reparations in favor of individuals. In most situations, the right to reparation still rests within municipal legal orders; there are no other means of enforcement except under national law.

International judicial mechanisms developed under the European and the American Conventions on Human Rights will hardly gain more than regional importance in this respect, although the interlinked mechanism of the European Commission and the European Court of Human Rights, which allows for a certain degree of individual complaint against infringements of



fundamental freedoms, has been recommended as a model for other areas.<sup>27</sup> Of practical significance could be the relevant UN procedures in fora such as the United Nations Claims Commission (UNCC). In this respect, however, more experience still has to be collected. In addition to the fact that practice remains to be developed in administering funds on behalf of UN organs, State practice remains decisive for legal development. This practice will be influenced, but not exclusively governed, by general principles as shaped in legal writings over the centuries.<sup>28</sup> There is still no comprehensive concept of reparations in cases of breach of humanitarian law. Practical solutions remain rudimentary, and it must be admitted that full reparation can hardly be expected in any case, even those involving grave breaches of the law.

Considering the issue in more general terms, and maybe in a longer time frame, however, allows for an overall picture in which legal principles are of clear relevance. The Martens clause, shaped into conventional law at the First Hague Peace Conference in 1899 and reaffirmed in the 1977 Additional Protocols to the Geneva Conventions, has been used to close legal lacunae and develop appropriate principles and rules in cases not covered by existing conventional law. Its reference to established custom, the principles of humanity, and the dictates of public conscience has provided arguments that have been seen as describing underlying principles for legal provisions and rules of conduct for States and international organizations. The relevance of these provisions and rules for legal and policy decisions has never been seriously disputed. The role of the media and its influence for international decision making has been very often enhanced by principles and attitudes which enjoy support in various quarters, even among people who disagree on many daily political issues. Backed by professional international institutions such as the ICRC, by relevant NGOs, and by academia, such principles are part of the process of law creation today, even in areas where there were different, or even no, rules at an earlier stage. This may lead to an application of legal rules developed for other purposes, in cases that had previously been considered quite different.

Lawmaking by analogy is not a new idea. Lawyers tend to draw arguments from comparable situations, cases, and legal regulations. Vattel was convinced that the rules of the natural law of nations can be derived by analogy from the natural law of man;<sup>29</sup> the opposite was, however, never common consensus. Rules of the law of nations have only limited influence on internal law. The differences in the responsibilities and interests involved are too great. Individuals can hardly compare their interests with group interests. It would be inappropriate to compare individuals with States; it may even remain an open question whether or not it is in the best interest of the individual to develop

rights (and duties) under international law independently from rights and duties of his or her home State. Yet individuals need protection against States, a requirement which is not limited to the relationship with their own State. This is so because today considerable ties, expanding in quantity and quality, exist between States and nationals of other States, requiring both sides to observe rules towards each other and making it necessary for individuals to claim rights on their own behalf without recourse to support from their home State. There is an evolving custom and indeed a developing legal *opinio* to prove the existence of such rights.<sup>30</sup>

This process has also affected the role of the individual in the development of law, its possible influence on decision making, and the interpretation of rules and their implementation. There are but rare exceptions to the principle that rules of international law are created by States and not by private individuals. But it should be remembered that States act through individual men and women as their representatives. These representatives are not only bound by instructions in performing their particular mission, but they very often actively develop positions that are approved by their superiors, even accepted without further deliberation. As are all individuals, government experts are subject to outside influences in a complex personal process of decision making. This is well accepted even by traditional law. The sources of international law enumerated in Article 38, paragraph 1(a–c), of the Statute of the International Court of Justice reveal a certain role of the individual in the lawmaking process. Treaties and contracts may be concluded between States or international organizations and foreign private law persons. Customary law and general principles of law are based on man-made arguments, subject to confirmation by State practice. As subsidiary means for the determination of rules of international law, Article 38, paragraph 1(d), expressly refers not only to judicial decisions but also to “the teachings of the most highly qualified publicists of the various nations.” The present information age may lead to a considerable increase in the influence of a large number of such persons. At the same time, the transparency of available information may also support mainstream trends in arguments and consideration of relevant State practice. Thus this development often contributes to practice-oriented, and less extravagant, results.

## Conclusions

Even if the present assessment remains incomplete in various respects and is subject to further developments, there can be no doubt of the fact that



individuals clearly have an active role to play as bearers of individual rights and obligations under international humanitarian law, or that individuals acting for States, international organizations, or even on their own enjoy considerable opportunity to participate in the development of that law.

The many factors of human decision making require an interdisciplinary approach, one which includes ethical, cultural, technological, economic, and operational considerations. A complete assessment must be based on an array of different aspects. There is no guarantee, however, that objective criteria will be observed. Rather, the importance of policy constraints suggests that the degree to which particular aspects will be taken into due consideration and weighed against other aspects and requirements is undergoing rapid development. The role of legal advisors in this complex process of decision making is a delicate one. Weighing different interests exposes him or her to blame for wishful thinking; sticking to the more technical task of interpreting existing rules and provisions would offer less than might be rightly expected.

Lawyers should stress the importance of policy constraints on military operations. It is their task to balance the rights and obligations of the operators in the field to ensure that they are fully informed about the relevant legal framework and that they fully use existing opportunities. This advisory task, however, has to be performed with a sense of proportion as regards the methods to be applied and the objective to be sought. It would be wrong to see the legal advisor solely in the role of *post factum* defender of the operator. Rather, he has to involve himself in the decision-making process, influence target selection, accept full responsibility for his advice, and develop the courage to dissuade others from excessive plans.

As Rosalyn Higgins has suggested, international law is a process of authoritative decision making, not just the neutral application of rules.<sup>31</sup> This is especially true for rules of armed conflict law, which are based on policy considerations derived from the principle of distinction between civilian objects and military objectives, the avoidance of unnecessary suffering or superfluous injury, and the prohibition of acts of perfidy. The whole body of humanitarian law in armed conflicts is to be understood as a process of respecting and implementing these few principles. It is not a fixed set of bright line rules which can be applied irrespective of the factual context. To use Rosalyn Higgins's words, none of the problems explored can be satisfactorily resolved by confident invocation of a "correct rule."

It is interesting to speculate how Admiral Stockton would have reacted to some of the modern challenges described in this contribution. He would probably have developed arguments and positions different from those he



chose in his time. But he would surely have done so with an attitude very similar to that for which he was well known by his contemporaries. Practical assessments, professionalism, and legal passion might have led him to personal initiatives in support of both national interests and the protection of the rights of individuals.

It should be stressed that none of the many issues to be raised in this context can be solved without international cooperation. The existence of international rights and obligations depends on acceptance by more than one State. It is therefore not enough to draw on a particular national legal system. Rather, it is the international environment of individual action that also influences the legal assessment in a given context.

Results in this continuing process will remain as incomplete and imperfect as nearly everything else in legal development. It remains difficult to make convincing assessments except in retrospect. Long-term effects often remain obscure, and anticipating objections which may arise at a later stage is risky by any standard. Thus developing humanitarian law remains as much a challenge for individual actors as for States and organizations authorizing, sponsoring, or supporting this task.

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### Notes

1. Partsch, *Individuals in International Law*, in 8 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 316-21 (Bernhardt ed., 1985).

2. DE VATTTEL, *LE DROIT DES GENS OU PRINCIPES DU DROIT NATUREL*, 1758, , bk. III, ch. XVIII, p. 238 (Edition Carnegie, 1916); REMEC, *THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW ACCORDING TO GROTIUS AND VATTTEL* (1960).

3. HIGGINS, *PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 48-55 (1994), rightly developed the argument that the whole notion of "subjects" and "objects" has no credible reality and no functional purpose, considering that individuals are participants, along with States and international organizations, of a dynamic process of international cooperation in which international legal obligations are implemented, remedies and sanctions exercised, and disputes settled.

4. Similar efforts date back in the fifteenth century. See Green, *War Crimes, Crimes against Humanity and Command Responsibility*, *NAVAL WAR COLL. REV.*, Spring 1997 at 26.

5. 35(II) *ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL* 298 (1929).

6. *THE TRIAL OF MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY*, pt. 22 (H.M.S.O. 1950), at 447.

7. Thüerer, *Das Selbstbestimmungsrecht der Völker und die Anerkennung neuer Staaten*, in *NEUES EUROPÄISCHES VÖLKERRECHT NACH DEM ENDE DES OST-WEST-KONFLIKTES?* 43-58 (Neuhold & Simma eds., 1996).

8. Case 26/62, *van Gend & Loos*, Feb. 5, 1963, ECR 3. See also Case 33/70 (1970).

9. Aldrich, *Individuals as Subjects of International Humanitarian Law*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSTOF SKUBISZEWSKI* 851 (Makarczyk ed., 1996).

10. I OPPENHEIM, *INTERNATIONAL LAW* 848 (pt. 2-4) (Jennings & Watts eds., 9th ed. 1992).
11. DoD Directive 5100.77, DOD LAW OF WAR PROGRAM, July 10, 1979, para. E-1; U.S. NAVY, *THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL WARFARE* (NWP 1-14M) (1995), para. 6.1.2; FEDERAL MINISTRY OF DEFENCE OF GERMANY, *HUMANITARIAN LAW IN ARMED CONFLICTS—MANUAL*, § 211 (1992).
12. International Institute of Humanitarian Law, *Declaration on the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-International Armed Conflicts*, INT'L REV. RED CROSS, Sept.-Oct. 1990, at 404.
13. Greenwood, *Scope of Application of Humanitarian Law*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS*, § 211, para. 5 (Fleck ed., 1995).
14. BVerfGE 94,315, 330 (decision of May 13, 1996).
15. 333 U.N.T.S. 3; BGBl 1953 II 331. Art. 5, para. 2, of the London Agreement provided that "claims arising out of the Second World War by countries which were at war with or were occupied by Germany during that war, and by nationals of such countries, against the Reich and agencies of the Reich, including costs of German occupation, credits acquired during occupation on clearing accounts and claims against the Reichskreditkassen shall be deferred until the final settlement of the problem of reparation." The Treaty on the Final Settlement with respect to Germany of 12 September 1990 (BGBl 1990 II 1317) did not address reparations.
16. Fleck, *Implementing International Humanitarian Law—Problems and Priorities*, INT'L REV. RED CROSS, March-April 1991, at 140.
17. Thürer, *Humanität und Neutralität—zum politischen und völkerrechtlichen Spannungsverhältnis zweier Grundprinzipien der schweizerischen Aussenpolitik*, in *VÖLKERRECHT IM DIENSTE DES MENSCHEN: FESTSCHRIFT FÜR HANS HAUG* 279, 307 (Hangartner & Trechsel eds., 1986).
18. Thürer, in THÜRER, HERDEGEN & HOHLOCH, *DER WEGFALL EFFEKTIVER STAATSGEWALT: THE FAILED STATE*, *Berichte der Deutschen Gesellschaft für Völkerrecht*, 1996, at 9-47.
19. Differences of opinion on the military value of incendiary weapons, as affected (though not largely prohibited) by Protocol III of the Convention, may be of minor importance in this context.
20. Bourloyannis-Vrailas, *The Convention on the Safety of United Nations and Associated Personnel*, 44 INT'L & COMP. L. Q. 560 (1995).
21. Fleck & Saalfeld, *Combining Efforts to Improve the Legal Status of UN Peace-keeping Forces and their Effective Protection*, INT'L PEACEKEEPING, June-August 1994, at 82-84.
22. Penna, *The International Criminal Court*, 1 SINGAPORE J. INT'L & COMP. L. 227 (1997).
23. Green, *War Crimes, Crimes against Humanity, and Command Responsibility*, NAVAL WAR COLL. REV., Spring 1997, at 26-68.
24. Dixon, *Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 81 (1997).
25. Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996, G.A.O.R., 51st sess., supp. 10 (A/5110), at 125 (on the ILC Draft Articles).
26. E/CN.4/Sub.2/1996/17 (24 May 1996) (for the revised Basic Principles and Guidelines). See Report of the UN Secretary-General (E/CN.4/1997/29) and Commission on Human Rights Resolution 1997/29.
27. Dinstein, *The Implementation of International Human Rights*, in *RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG. FESTSCHRIFT FÜR RUDOLF BERNHARDT* 353 (Beyerlin et al. eds., 1995).

28. Green, *Enforcement of the Law in International and Non-International Conflicts—The Way Ahead*, 24 DENVER J. INT'L L. & POL'Y 285 (1996).

29. REMEC, *supra* note 2, at 128.

30. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989).  
HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS (1988).

31. HIGGINS, *supra* note 3, at 267.





# VI

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## What Is—Why Is There— the Law of War?

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Leslie Green

WRITING IN 1832, Clausewitz maintained that:

[T]o impose our will on the enemy is [the] object of force. . . . The fighting force must be *destroyed*: that is they must be *put in such a condition that they can no longer carry on the fight*. . . . War is an act of force, there is no logical limitation to the application of force. . . . *Attached to force are certain imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it*. . . . [In fact,] kind-hearted people might . . . think there was some ingenious way to disarm or defeat an enemy without too much bloodshed, and might imagine that is the true goal of the art of war. Pleasant as it sounds, it is a fallacy that must be exposed: war is such a dangerous business that the mistakes which come from kindness are the very worst. . . . [However,] if civilized nations do not put their prisoners to death or devastate cities and countries, it is because intelligence plays a larger part in their methods [than was the case among savages] and has taught them more effective ways of using force than the crude expression of instinct.<sup>1</sup>

In response to this assertion, it might be said that the very “intelligence” to which he refers as playing a larger part in the methods of warfare, in fact expresses itself in the very rules of international law and custom which he

cynically derides as “hardly worth mentioning.” As if to confirm this, reference may be made to the comment by General Colin Powell when submitting his report to the United States Congress on “The Role of the Law of War” during Operation DESERT STORM. In opening, the general stated, “Decisions were impacted by legal considerations at every level, [the law of war] proved valuable in the decision-making process.”<sup>2</sup>

Before we can legitimately comment on the issue of legal control—the *jus in bello*—it is necessary to pay some attention to the lawfulness of war itself—the *jus ad bellum*. In earlier times this meant deciding whether the war was being fought for a “just” cause, a characterization largely dependent on whether the war received the approval of the church.<sup>3</sup> In accordance with the views of Machiavelli, this soon came to mean that any war in which a Christian prince was engaged was obviously “just”<sup>4</sup> and “a necessary war is a just war,”<sup>5</sup> while the “fathers” of international law sought to set out a variety of causes which would enable a ruler—justly—to resort to the use of force, normally in the name of self-defense. With the rise of socialism and the workers’ movement, the concept of “justness” shifted, so that the only “just war” was the “class war.” However, in practice this was shown to be nothing but an ideology, for with but few exceptions even the “workers” were prepared to defend their country when it was a victim of aggression.

The first international steps towards declaring war illegal came with the adoption of the Covenant of the League of Nations.<sup>6</sup> While this did not expressly ban war, it sought to limit the occasions on which a League member could resort to force. In accordance with Article 16, “should any Member of the League resort to war in disregard of its covenants . . . , it shall ipso facto be deemed to have committed an act of war against all Members of the League,” thereby laying itself open to the imposition of economic sanctions. In practice, as demonstrated in, for example, the Italo-Ethiopian war, this did not really amount to a great deal. The practical difficulty of forbidding war and making resort thereto an offense against international law may be seen in the fate of the draft Treaty of Mutual Assistance drawn up by the League Assembly in 1923.<sup>7</sup> This solemnly proclaimed “that aggression is an international crime,” with the parties undertaking that “no one will be guilty of its commission.” The “criminal” penalty envisaged was purely financial. Since it proved impossible to define “aggression,” the treaty remained a draft. The same fate befell the 1924 Draft Treaty of Disarmament and Security.<sup>8</sup> Equally abortive was the League’s Geneva Protocol for the Pacific Settlement of International Disputes of 1924.<sup>9</sup> By this, “a war of aggression constitutes a violation of [the] solidarity [of the



members of the international community] and an international crime; . . . and [with a view to] ensuring the repression of international crimes” the parties forswore war save by way of “resistance to acts of aggression or when acting in agreement with the Council or the Assembly of the League of Nations in accordance with provisions of the Covenant and of the present Protocol.” As with earlier exercises, there was no provision for criminal liability, other than financial sanctions. The same is true of the various hortatory or declaratory resolutions to similar effect adopted by both the League Assembly or the Conference of American States. This did not, however, inhibit the International Military Tribunal at Nuremberg from resting part of its finding that aggressive war was criminal at international law on these non-binding instruments.<sup>10</sup>

It was not until Secretary of State Frank Kellogg of the United States and Foreign Minister Aristide Briand of France proposed the agreement which carries their names, officially the Pact of Paris for the Renunciation of War, that any treaty dealing with the “legality” of war was adopted. The 1928 Pact was somewhat simple in its terms, merely stating that the High Contracting Parties—by the outbreak of World War II this included almost all independent States—“condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy [and] agree that the settlement of or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be brought about except by peaceful means.”<sup>11</sup>

The sole sanction indicated in the Pact is denial of the benefits provided by it to the offender. An appreciation of what this might mean is to be found in the Articles of Interpretation adopted by the International Law Association at its Budapest meeting in 1934.<sup>12</sup> Having stated the obvious, that a party resorting to armed force to solve an international dispute “is guilty of a violation of the Pact,” as is any State assisting such a violator, the Articles go on to provide that a victim of such a violation, as well as all other signatories, “*may*”—not “*shall*”—deny the violator all the rights of a belligerent. Signatories are also excused from any of the normal obligations attaching to neutrality, so that they would be entitled to assist the victim with finances, supplies, and even armed forces. Equally, the aggressor would not be entitled to receive recognition either *de facto* or *de jure* of any territorial or other advantage ensuing from the aggression. Finally, the aggressor would be liable to pay compensation for all damage incurred by any party as a result of the breach.

It is noticeable that the Budapest Articles of Interpretation say nothing about the criminality of an act of aggression in breach of the Pact.

Nevertheless, the Nuremberg Tribunal apparently found no difficulty in asserting that "the solemn renunciation of war as an instrument of national policy [in the Pact] necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war . . . are committing a crime in so doing. . . . War [is] essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."<sup>13</sup>

This statement calls for comment. In the first place, the Tribunal has ignored the fact that not every breach of an agreement—or even of legislation—constitutes a crime. Second, the interpretation of the Pact in this way is completely gratuitous and unnecessary. By Article 6 (a) of the London Charter establishing the Tribunal, among the crimes against peace over which the Tribunal is granted jurisdiction is "planning, initiation or waging of a war of aggression, or a war in violation of international treaties. . . ." It follows, therefore, that it is the constituent instrument of the Tribunal which has rendered criminal a war of aggression or breach of the Pact, which is merely an "international treaty." It was thus completely redundant for the Tribunal to go into any detailed study of draft or other documents to ascertain whether such a war was criminal or not.

Not even the Charter of the United Nations, at least not *expressis verbis*, speaks of the criminality of war. Article 2, paragraphs 3 and 4, simply provide that "all Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. [They] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." The only clear sanction should these commitments be ignored depends on the Security Council and its decision to invoke the provisions in Chapter VII relating to a threat to the peace, a breach of the peace, or an act of aggression. Should the Council authorize military action in such circumstances, those complying with the decision are not in breach of any legal requirement. Other than this, the only recourse to armed conflict that is permitted under the Charter is by way of self-defense against an armed attack. Other recourse to arms would constitute an act of aggression and a crime in the light of the Nuremberg judgment, for the General Assembly has affirmed the Principles of International Law Recognized by the Charter of the



Nuremberg Tribunal,<sup>14</sup> and authorized the International Law Commission to draw up a Statement of Principles Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal;<sup>15</sup> these Principles are now generally regarded as constituting part of international customary law.

Even if it is claimed that a resort to arms is in accordance with Article 51 of the Charter, problems may arise as to whether the claim is justified and self-defense legally resorted to. By Article 51, it may only occur in response to an armed attack. However, the article describes the right as being "inherent," which raises the question whether it may be resorted to by way of preventive or anticipatory action,<sup>16</sup> since it is hardly likely that the draftsmen of the Charter intended a "victim" to wait until it was, for example, devastated by nuclear attack before taking steps to defend itself. Moreover, since the right is "inherent,"<sup>17</sup> it cannot be presumed that the members of the United Nations have less right to defend themselves than do non-members. War, other than under these conditions, would constitute aggression and thus amount to an international crime in accordance with the exposition of the law as given at Nuremberg. If war is illegal and criminal, say the cynics, how can one speak of the law of war? Is not this completely out of line with the normal rules concerning criminal law? It is not usual to declare a particular act to be a crime and then lay down rules as to how that crime is to be committed. Such an approach, however, betrays a lack of historical knowledge and any appreciation of the purpose of the law of war.

Even in the Old Testament there are instances of the significance of restraints on the conduct of war. During their conquest of Canaan, the Israelites conducted many campaigns of total destruction, but this only happened when the war in which they were engaged was undertaken at the direct order of God and directed against heathens who had rejected Him. To show mercy would be a sin against the Lord.<sup>18</sup> Even in such a war, however, they were exhorted to have recourse to siege only if the city involved had rejected an opportunity to surrender.

When thou comest nigh unto a city to fight against it, then proclaim peace unto it. And . . . if it make thee answer of peace, and open unto thee, then . . . all the people that is found therein shall be tributaries unto thee. And if it will make no peace with thee, but will make war against thee, then thou shalt besiege it. And when the Lord thy God hath delivered it into thine hands, thou shalt smite every male thereof with the edge of the sword: But the women, and little ones, and the cattle, and all that is in the city, even all the spoil thereof, shalt thou take unto thyself; and thou shalt eat the spoil of thine enemies. . . . When thou shalt



besiege a city a long time in making war against it to take it, thou shalt not destroy the trees thereof by wielding an axe against them; for thou mayest eat of them, but thou shalt not cut them down; for is the tree of the field man, that it shall be besieged of thee? Only the trees of which thou knowest that they are not trees for food, them thou mayest destroy and cut down, that thou mayest build bulwarks against the city that makes war with thee, until it fall.<sup>19</sup>

It would appear, therefore, that ecological considerations were significant even then, forbidding destruction of resources essential to the survival of man. Maimonides, perhaps the greatest of Jewish Diaspora scholars, states that the destruction of fruit trees for the mere purpose of afflicting the civilian population is prohibited, and Rabbi Ishmael goes so far as to state that "not only fruit trees but, by argument from minor to major, stores of fruit itself may not be destroyed."<sup>20</sup>

Not until Protocol I annexed to the Geneva Conventions of 1949 was adopted in 1977 was a similar principle embodied in the international black-letter law of armed conflict. Even then, "objects indispensable to the civilian population" may not be attacked or destroyed, unless they "are used . . . as sustenance solely for the members of [the adverse party's] forces . . . or in direct support of military action," but in the latter case care must be taken to ensure that the civilian population is not left "with such inadequate food or water as to cause its starvation or force its movement."<sup>21</sup>

The Israelites were also enjoined to restrain themselves in their dealings with enemy combatants. Thus, "rejoice not when thine enemy falleth, and let not thine heart rejoice when he stumbleth; lest the Lord see it, and it displeases Him, and He turn away His wrath from him."<sup>22</sup> Moreover, insofar as prisoners of war are concerned, "if thine enemy be hungry, give him bread to eat; and if he be thirsty, give him water to drink." This injunction goes so far as to inspire the prophet Elisha to reply to the king's inquiry whether he might kill his prisoners: "Thou shalt not smite them: wouldest thou smite those whom thou hast taken captive with thy sword and with thy bow? Set bread before them, that they may eat and drink and go to their master. And he prepared great provision for them: and when they had eaten and drunk, he sent them away and they went to their master."<sup>24</sup> Even in those instances when the Torah or the Prophets indicated that extreme action be taken against an enemy,

the rabbis softened the impact of much of the old law through reinterpretation or imaginative explanation. Due to this it seems that the Israelites were indeed a "merciful" people when compared with their neighbors, such as the Assyrians.

Although, as in any case, exceptions and violations to regulations occurred, on the whole, the Israelite warriors conducted themselves in a disciplined, restricted manner in accordance with rules and regulations derived from divine inspiration.<sup>24</sup>

However, breaches of these injunctions were, for the main part at least, only subject to divine punishment.

The Israelites were not alone among the ancients whose conduct of war was under restraints. Sun Tzu, in his *The Art of War*, is one of the most ancient commentators on warfare, and in his view, "Generally in war the best policy is to take a state intact; to ruin it is inferior to this. To capture the enemy's army is better than to destroy it; to take intact a battalion, a company or a five-man squad is better than to destroy them. . . . To subdue the enemy without fighting is the acme of skill. . . . The worst policy is to attack cities. Attack cities only when there is no alternative."<sup>25</sup> Even as early as the seventeenth century B.C., the Chinese were applying what may only be described as principles of chivalry when engaged in conflict, it being "deemed unchivalrous . . . [to take] advantage of a fleeing enemy who was having trouble with his chariot . . . [or to] attack an enemy state . . . when it was divided by internal troubles."<sup>26</sup>

Similarly, some measures of humanitarianism are to be found in both the *Ramayana*<sup>27</sup> and the *Mahabharata*,<sup>28</sup> postulating a series of principles regulating conduct in war, many of which have only recently been accepted as part of the modern law of war: "When he fights his foes in battle, let him not strike with weapons concealed in wood, nor with such as are barbed, poisoned, or the points of which are blazing with fire."<sup>29</sup> Neither poisoned nor barbed weapons should be used. These are weapons of the wicked."<sup>30</sup> Foretelling the modern rule relating to proportionality,<sup>31</sup> as well as the ideological—and unrealistic—view of those who assert that sophisticated weapons should not be used against unsophisticated peoples,

A car warrior should fight a car warrior. One on horse should fight one on horse. Elephant riders must fight with elephant riders, as one on foot fights a foot soldier. When the antagonist has fallen into distress he should not be struck: brave warriors do not shoot at one whose arrows are exhausted. No one should strike another that is retreating.<sup>32</sup> . . . [L]et him remember the duty of honourable warriors; do not kill a man when he is down, even a wicked enemy, if he seeks shelter, should not be slain.

The Sanskrit writers, in their treatment of noncombatants, remind us of the remark attributed by Shakespeare's *Henry V* to Fluellen at Agincourt in 1415:



"Kill the boys and the luggage! 'Tis expressly against the law of arms: 'tis as arrant a piece of knavery as can be offer'd."<sup>33</sup> These early epics warn us that:

[C]ar-drivers, men engaged in the transport of weapons, . . . should never be slain. No one should slay him who goes out to procure forage or fodder, camp followers or those that do menial service. No one should kill him that is skilled in a special art. He is no son of the Vishni race who slayeth a woman, a boy or an old man. Let him not strike one who has been grievously wounded. A wounded opponent shall either be sent to his own home, or if brought to the victor's quarters, have his wounds attended to, and when cured he shall be set at liberty. This is eternal duty.<sup>34</sup> Night slaughter is horrible and infamous. With death our enmity has terminated.

Thus, any desecration of a corpse, such as taking of ears or other mementos, was forbidden. Finally, as to the treatment of occupied territory and its inhabitants, "Customs, laws and family usages which obtain in a country should be preserved when that country has been acquired. Having conquered the country of his foe, let him not abolish or disregard the laws of that country. A king should never do such injury to his foe as would rankle in the latter's heart."<sup>35</sup>

It becomes evident from these examples that many of the rules of the ancients go further than what is to be found in either the Hague or the Geneva law.<sup>36</sup> They indicate that the ancients considered war an unfortunate occurrence, with the ensuing damage to be kept to a minimum and every effort made to secure a peaceful and fruitful future for both the victor and the vanquished. This interpretation accords with that of Gibbon commenting on the behaviour of the Scythians in the fifth century,

In all their invasions of the civilized empires of the South, the Scythian shepherds have been uniformly actuated by a savage and destructive spirit. The laws of war that restrain the exercise of national rapine and murder, are founded on two principles of substantial interest: the knowledge of the permanent benefits which may be obtained by a moderate use of conquest; and a just apprehension lest the desolation which we inflict on the enemy's country may be retaliated on our own. But these considerations of hope and fear are almost unknown in the pastoral state of nations.<sup>37</sup>

One is sometimes caused to wonder whether they are any more known or applied in industrial States!

Long before the period to which Gibbon was referring, there was some regulation of what was allowed during war. This becomes clear if one looks to



the practice of ancient Greece and Rome, in which urban centers in the form of cities, and city-states were well established. A leading commentator has said,

The rule and principles of war were considered by both Hellas and Rome to be applicable only to civilized sovereign States properly organized, and enjoying a regular constitution; and not conglomerations of individuals living together in an irregular and precarious association. Rome did not regard as being within the comity of nations such fortuitous gatherings of people, but only those who were organized on a civilized basis, and governed with a view to the general good, by a properly constructed system of law. . . . Hence barbarians, savage tribes, bands of robbers and pirates, and the like were debarred from the benefits and relaxations established by international law and custom. . . . [A]s to the general practice of war in Hellas[,] we find remarkable oscillations of wartime policy. Brutal treatment and noble generous conduct are manifested at the same epoch, in the same war, and apparently under similar circumstances. At times we hear of proceedings which testify to the intellectual and artistic temperament of the Greeks; at other times, we read narratives which emphasise the fundamental cruelty and disregard of human claims prevalent amongst the ancient races when at war with each other. In Homer . . . hostilities for the most part assumed the form of indiscriminate brigandage, and were but rarely conducted with a view to achieving regular conquests, and extending the territory of the victorious community. Extermination rather than subjection of the enemy was the usual practice. . . . Sometimes prisoners were sacrificed to the gods, corpses mutilated and mercy refused to children, and to the old and sickly. On the other hand, acts of mercy and nobility were frequent. . . . The adoption of certain cowardly, inhuman practices, such as, for example, the use of poisoned weapons, was condemned. . . .<sup>38</sup> In reference to the conduct of war in Greece, it is important to remember that it was between small States, whose subjects were to an extraordinary degree animated by patriotism and devotion to their mother-country, that every individual was a soldier-politician who saw his home, his life, his family, his gods, at stake, and, finally, that he regarded each and every subject of the opposing States as his personal adversary. . . .<sup>39</sup> [Nevertheless,] temples, and priests, and embassies were considered inviolable. . . . Mercy was shown to . . . helpless captives. Prisoners were ransomed and exchanged. Safe-conducts were granted and respected. Truces and armistices were established and, for the most part, faithfully observed. . . . Burial of dead was permitted; and graves were unmolested. It was considered wrong and impious to cut off or poison the enemy's water supply, or to make use of poisoned weapons. Treacherous stratagems of every description were condemned as being contrary to civilized warfare. And . . . it is essential to emphasize that the non-existence of the law and universally accepted custom relating to them is not necessarily proved when we point here and there to conduct of a contrary nature.<sup>40</sup>

This latter point is not always sufficiently acknowledged in our own time.

The same commentator goes on to point out that by the time of the Roman empire the nature of the State had changed with Rome a centralized authority. Now, the practices in war

varied according as their wars were commenced to exact vengeance for gross violations of international law, or for deliberate acts of treachery. Their warlike usages varied also according as their adversaries were regular enemies . . . or uncivilized barbarians<sup>41</sup> and bands of pirates and marauders. . . . The Roman conduct [under Germanicus] far transcended in its civilized and humane character that of the German leader, Arminius, who is reported [by Tacitus<sup>42</sup>] to have burnt to death and otherwise barbarously<sup>43</sup> slain the centurions and tribunes of the Varian legions, and nailed their skulls to trees. Undoubtedly, the belligerent operations of Rome, from the point of view of introducing various mitigations in the field, and adopting a milder policy after victory,<sup>44</sup> are distinctly of a progressive character. They were more regular and disciplined than those of any other ancient nation. They did not as a rule degenerate into indiscriminate slaughter and unrestrained devastation. The *ius belli* imposed restrictions on barbarism, and condemned all acts of treachery. . . . [Livy tells us<sup>45</sup>] there were laws of war as well as peace, and the Romans had learnt to put them into practice not less justly than bravely. . . . The Romans [says Cicero<sup>46</sup>] refuse to countenance a criminal attempt made on the life of even a foreign aggressor.<sup>47</sup>

In so far as Islam is concerned, the Caliph Abu Bakr commanded his troops, “[L]et there be no perfidy, no falsehood in your treaties with the enemy, be faithful to all things, proving yourselves upright and noble and maintaining your word and promises truly.”<sup>48</sup> The ninth century Islamic statement on the law of nations bans the killing of women, children, the aged, the blind, the crippled and helpless insane.<sup>49</sup> Moreover, while fighting was in progress between the *dar al-Islam* (the territory of Islam) and the *dar al-harb* (the rest of the world, also known as the “territory of war”), “Muslims were under legal obligations to respect the rights of non-Muslims, both combatants and civilians.” Booty did not belong to the captor but was to be shared according to set rules. “The prisoner of war should not be killed, but he may be ransomed or set free by grace,” although if it would be advantageous to the Muslims, non-Muslim prisoners could be killed unless they converted, when they would be regarded as booty.<sup>50</sup>

Once we come to the age of chivalry, we find the role of the Church significant, particularly as it frequently reflected the desires of the orders of knighthood. Thus, the condemnation of the use of the crossbow and the arc by the Second Lateran Council in 1139 coincided with the views of the knightly



orders who fought hand-to-hand and considered such weapons disgraceful since they could be used from a distance by an unseen foe, including villains, who could strike without the risk of being struck himself.<sup>51</sup> The axe, mace, halberd, ball-and-chain, military fork, and a variety of lances used by the knights for close combat and dismounting an opponent were merely up-to-date variants of the striking weapons of the ancients, which had been “confined to arm, foot, or mouth-propelled instruments [as well as] war-hammers, battle-axes, and swords; thrusting spears; and missile weapons, such as the hurled spear, or javelin, the arrow propelled by arm- or foot-drawn bow, or the blow-pipe. The striking edge or point of these weapons [had been] of hard wood, stone, bone, or metal.”<sup>52</sup>

As iron-clad warriors<sup>53</sup> disappeared, their specialized weapons fell into desuetude; they are now considered illegal. The process of condemnation and potential rejection was assisted by the Church, anathemizing such weapons as darts and catapults “in order to reduce as far as possible the engines of destruction and death.”<sup>54</sup> Despite the condemnation of weapons causing numerous deaths, gunpowder was soon in common use, although in 1439, “when the army of Bologna, using a new handgun, killed a number of plate-armoured Venetians, feeling ran so high at this disregard for the game of war, that the victorious Venetians massacred all prisoners who had stooped so low as to use this ‘cruel and cowardly innovation,’ gunpowder. It would, if unchecked, they said, make fighting a positively DANGEROUS profession.”<sup>55</sup> Such disregard of the rules led Belli to comment a century later that “today regard is so far lacking for this [Church] rule that firearms of a thousand kinds are the most common and popular implements of war, as if too few avenues of death had been discovered in the centuries, had not the generations of our fathers, rivaling God with his lightning, invented this means whereby, even at a single discharge, men are sent to perdition by the hundreds.”<sup>56</sup>

The “law of chivalry” was nothing but a customary code of chivalrous conduct recognized by the feudal knights as controlling their affairs.<sup>57</sup> This was enforced by arbitrators specially appointed and even by Courts of Chivalry.<sup>58</sup> As early as 1307, such courts were trying breaches of parole,<sup>59</sup> considered a major disregard of the “law of arms”—a system so well recognized that when in 1370 at the siege of Limoges the English commander issued orders forbidding quarter, three captured French knights appealed to John of Gaunt and the Earl of Cambridge, “My Lords we are yours: you have vanquished us. Act therefore to the law of arms.” Their lives were spared, and they were treated as prisoners who could, of course, be ransomed.<sup>60</sup> The principles of the law of arms were sufficiently well recognized by the time of Elizabeth that, as has already been



pointed out, Shakespeare could make specific reference to them when writing of Henry V's conduct at Agincourt.<sup>61</sup>

By the middle of the fifteenth century, the Constable of France was trying a variety of *ecorcheur* captains for war crimes.<sup>62</sup> Perhaps more significant was the 1474 trial by a tribunal made up of representatives of the Hanseatic cities of Peter of Hagenbach for administering occupied territory in a manner "contrary to the laws of God and of man." His plea that he had been carrying out the orders of his lord was rejected, and he was executed.<sup>63</sup>

The rules of chivalry did not apply to the ordinary foot soldier, whose conduct was regulated by national military codes giving commanders the "rights of justice" over miscreants. Thus, the 1385 code of Richard II of England forbade pillage of the church, victuals, provisions, or forage; also, among other things it provided for parole by prisoners, who were not to be considered property of their captors, but of the king.<sup>64</sup> By the fifteenth century, when nearly all men-at-arms were included in official musters, subject to disciplinary codes of this kind, enforcement of the law became easier. By the seventeenth century most of the countries of Europe had such codes forbidding violence against women, marauding of the countryside, individual acts against the enemy unless authorized by a superior, private taking or keeping of booty, or the private detention of any prisoner.<sup>65</sup> Of these codes it has been said that together with the rules of international law, they constitute "*le meilleur frein pratique pour imposer aux armées le respect d'un *modus legitimus de mener les guerres*.*"<sup>66</sup>

As to the position of women, the French knights had been adamant in protecting the modesty of those found in surrendered cities, and Coligny made violence against them punishable by death.<sup>67</sup> By the beginning of the seventeenth century the honor of women was so well established that Gentili could state that "to violate the honour of women will always be held to be unjust," quoting as evidence the view of Alexander, "I am not in the habit of warring with prisoners and women."<sup>68</sup> This would suggest that the rape of women has from earliest times been considered a war crime. Moreover, in the Lieber Instructions for the Government of the Armies of the United States in the Field, 1863, which formed the basis of most subsequent military codes, express provision is made, with respect to providing protection of inhabitants in occupied territories, for the protection of women.<sup>69</sup> In 1974, the General Assembly Declaration on the Protection of Women and Children in Emergency and Armed Conflict provided that "all forms of repression and

inhuman treatment of women . . . committed by belligerents in the course of military operations or in occupied territories shall be considered criminal.”<sup>70</sup> More recently, 1977 Protocol I annexed to the 1949 Geneva Conventions expressly states, “Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.”<sup>71</sup> This series of provisions leads one to question the integrity and purpose of those feminists who now seek to have rape specifically declared a war crime, particularly since it has been charged as such in many of the indictments issued by the Ad Hoc Tribunal for the former Yugoslavia.

In earlier days, combatants were not over-concerned with the fate of the wounded, particularly those belonging to an enemy, and this was especially so during the religious campaigns of the Crusades. Nevertheless, by the twelfth century the knights of the Order of St. John had established a hospital in Jerusalem for the care of the sick and injured, and by the sixteenth century they had established themselves as the Sovereign Order of Malta with the same purpose in mind. About the same time, writers were beginning to assert that doctors, who were often in clerical orders, enjoyed a special immunity. In the early part of the fourteenth century Bartolus maintained they were free from seizure, and Belli used this as a basis for stating that during war, the “persons of doctors may not be seized, and they must not be haled to court or otherwise harassed.”<sup>72</sup> By the time of Louis XIV, attention had been directed to providing for the care of the wounded; in a 1708 decree a permanent medical service was established “*à la suite des armées et dans les places de guerre*.”<sup>73</sup> During the siege of Metz in 1552–1553 François de Guise summoned the French surgeon Ambroise Paré “to succour the abandoned wounded soldiers of the enemy and to make arrangements for their transport back to their army”<sup>74</sup>—a practice not embodied into treaty law until three centuries later.<sup>75</sup>

During later conflicts, a variety of reciprocal arrangements were made for the care of the wounded, of which only one or two need be mentioned.

[The] convention made in 1743, between Lord Stair on behalf of the Pragmatic army and the Marshal Noailles for the French during the Dettingen campaign bound both sides to treat hospitals and wounded with consideration. Noailles, when he felt that his operations might cause alarm to the inmates of the hospitals at Techenheim, went so far as to send word that they should rest tranquil as they would not be disturbed. A fuller and more highly developed type of agreement was signed at L'Ecluse in 1759 by the Marshal de Baril, who commanded the French, and Major-General Conway, the British general officer commanding. The hospital staff, chaplains, doctors, surgeons and apothecaries were not . . . to be taken prisoners; and if they should happen to be apprehended within the lines



of the enemy, they were to be sent back immediately. The wounded of the enemy who should fall into the hands of their opponents were to be cared for, and their food and medicine should in due course be paid for. They were not to be made prisoner and might stay in hospital safely under guard. . . . Peyrilhe in 1780 proposed international recognition of the principle that the wounded should not be made prisoners of war and should not enter into the balance of exchanges.<sup>76</sup>

It was not, however, until after Dunant's *Souvenir of Solferino* in 1862 that this form of *ad hoc* arrangement received permanence and international recognition by way of the establishment of the International Committee of the Red Cross.<sup>77</sup>

The Middle Ages saw other customs developing which have ceased to be of topical importance, although in some instances they have been responsible for current practices. During the Hundred Years War it was possible to distinguish between *guerre mortelle*, war to the death; *bellum hostile*, a war between Christian princes in which prisoners could ransom themselves; *guerre guerriable*, fought in accordance with the feudal rules of chivalry; and the truce, which indicated a temporary cessation of hostilities during which the wounded and dead might be collected. Any resumption of actual fighting following a truce was considered a continuation of an ongoing conflict rather than commencement of a new one—an attitude which applies at present with regard to the relations between Israel and those of her Arab neighbors with whom no peace treaty has yet been signed. Each category of conflict had its own rules, but they were rules of honor rather than of law or humanitarianism. Unless it was a conflict in which no quarter was to be given—and this was indicated by raising a red pennant<sup>78</sup>—prisoners and others enjoying immunity, such as heralds, carried a white wand or even a white paper in their head-dress—is this the origin of the white flag?—and were frequently allowed freedom of movement under safe-conducts or were employed as messengers between the contending forces.<sup>79</sup>

In order to appreciate the reasons for and nature of the law of war, it is not enough just to look to the practices of the Middle Ages. Reference must also be made to the writings of the classical writers on international law, for to the extent that these were consistent or expressed commonly held views prevalent at the time, their writings constitute evidence of customary law. Thus, in words which are almost modern, Gentili wrote,

[I]n war . . . victory is sought in no prescribed fashion. . . . Our only precaution must be not to allow every kind of craft and every kind of cunning device; for evil is not lawful, but an enemy should be dealt with according to law. . . . In dealing



with a just and lawful enemy we have the whole fetial law and many other laws in common. . . . Necessity does not oblige us to violate the rights of our adversaries . . . [but] the laws of war are not observed toward one who does not observe them."<sup>80</sup>

This latter statement is of course not valid today, at least insofar as the Geneva principles are concerned.

Grotius, commonly (though wrongly) described as "the father of international law," is somewhat self-contradictory. First, he states that "by the Law of Nations any Thing done against an Enemy is lawful . . . It is lawful for an Enemy to hurt another both in Person and Goods . . . [and for] both sides to do so without Distinction."<sup>81</sup> However, later, when discussing Moderation concerning the Right of Killing Men in a Just War, he states that "there are certain Duties to be observed even toward those who have wronged us"<sup>82</sup> and calls for avoidance of useless fighting, which is "wholly repugnant to the Duty of a Christian, and Humanity itself. Therefore all Magistrates ought strictly to forbid these Things, for they must render an account for the unnecessary shedding of Blood to him, whose Viceregents they are."<sup>83</sup>

Having pointed out that the man in the field is forbidden from acting as if the conflict were a private affair and so is neither to keep captured property for himself nor commit warlike acts after a retreat or an armistice,<sup>84</sup> he continues:

It is not enough that we do nothing against the Rules of rigorous Justice, properly so called; we must also take Care that we offend not against charity, especially Christian Charity. Now this may happen sometimes; when, for Instance, it appears that such a plundering doth not so much hurt the [enemy] State, or the King, or those who are culpable themselves, but rather the Innocent, whom it may render so extremely miserable. . . . But farther, if the taking of this Booty neither contributes to the finishing of the War, nor considerably weaken the Enemy, the Gain arising to himself only from the Unhappiness of the Times, would be highly unbecoming an honest Man, much more a Christian. . . . Yet if a Soldier, or any other Person, even in a just War, shall burn the Enemy's House, without any Command, and besides when there is no Necessity, or just Cause, in the Opinion of the Divines he stands obliged to make Satisfaction for those Damages. I have with Reason added . . . if there be not a just Cause, for if there be, he may perhaps be answerable to his own State, whose orders he hath transgressed, but not to his Enemy, to whom he hath done no wrong.<sup>85</sup>

Seeking a perspective which largely reflects what States actually did, we might cite the views of Vattel.

Since the object of a just war is to overcome injustice and violence, and to use force upon one who is deaf to the voice of reason, a sovereign has the right to do to his enemy whatever is necessary to weaken him and disable him from maintaining his unjust position; and the sovereign may choose the most efficacious and appropriate means to accomplish that object, provided those means be not essentially unlawful, and consequently forbidden by the Law of Nations. *A lawful end confers a right only to those means which are necessary to attain that end. Whatever is done in excess of such measures is contrary to the natural law, and must be condemned as evil before the tribunal of conscience. . . . [A]s it is very difficult sometimes to form a just estimate of what the actual situation demands, and, moreover, as it is for each Nation to determine what its particular circumstances warrant its doing, it becomes absolutely necessary that Nations should mutually conform to certain general rules on this subject.* Thus, when it is clear and well recognized that such a measure, such an act of hostility, is, in general, necessary for overcoming the resistance of the enemy and attaining the object of lawful war, the measure, viewed thus in the abstract, is regarded by the Law of Nations as lawful and proper in war, although the *belligerent who would make use of it without necessity, when less severe measures would have answered his purpose, would not be guiltless before God and his conscience. This is what constitutes the difference between what is just, proper, and irreprehensible in war, and what is merely permissible and may be done by Nations with impunity.*<sup>86</sup>

Gentili, too, wrote of restraints in war—[it is] “only when we cannot overcome their resistance and bring them to terms by less severe means, that we are justified in taking away [the] lives” of the enemy.<sup>87</sup> Equally condemned were denial of quarter, reprisals against prisoners,<sup>88</sup> violence against women, children, the aged and the sick, ecclesiastics, men of letters, husbandmen, and, generally, all unarmed persons. Assassination, the use of poison and poisoned weapons, as well as the poisoning of wells, streams and springs were also beyond the pale.<sup>89</sup>

Of all classical writers, Vattel was the most concerned in seeking to limit war’s horrors:

Necessity alone justifies Nations in going to war; and they should all *refrain from, and as a matter of duty oppose, whatever tends to render war more disastrous. . . . All acts of hostility which injure the enemy without necessity, or which do not tend to procure victory, are unjustifiable and as such condemned by the natural law. . . . As between Nation and Nation, we must lay down general rules, independent of circumstances and of certain and easy application. Now, we can only arrive at such rules by considering acts of hostility in the abstract and in their essential character. Hence, . . . the voluntary Law of Nations limits itself to forbidding acts that are essentially unlawful and obnoxious, such as poisoning, assassination, treason, the*

massacre of an enemy who has surrendered and from whom there is nothing to fear, . . . [and] condemns every act of hostility which . . . contributes nothing to the success of our arms, and neither increases our strength nor weakens the enemy. On the other hand, it permits or tolerates every act which in its essential nature is adapted to attaining the end of the war; and it does not stop to consider whether the act was unnecessary, useless or superfluous in a given case *unless there is the clearest evidence that an exception should have been made in that instance; for where the evidence is clear freedom of judgment cannot be exercised.* Thus it is not, generally speaking, contrary to the laws of war to plunder and lay waste a country. But if an enemy of greatly superior forces should treat in this manner a town or province which he might easily hold possession of as a means of obtaining just and advantageous terms of peace, *he would be universally accused of waging war in a barbarous and uncontrolled manner.* The deliberate destruction of public monuments, temples, tombs, statues, pictures, etc., is, therefore, absolutely condemned . . . , as being under no circumstances conducive to the lawful object of war. The pillage and destruction of towns, the devastation of the open country by fire and sword, are acts no less to be abhorred and condemned when they are committed without evident necessity or urgent reasons.<sup>90</sup>

It is of interest to note that it was not until the adoption of Protocol I in 1977<sup>91</sup> that impedimenta of the world's cultural heritage<sup>92</sup> or objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas, crops, drinking water installations and the like, came under treaty protection.

The American Civil War produced the first modern codification of regulations for use during conflict, with the promulgation by President Abraham Lincoln of the *Instructions for the Government of Armies of the United States in the Field*,<sup>93</sup> which had been prepared by Professor Francis Lieber of Columbia. Lieber's motivation in preparing this draft may be seen from his *Political Ethics*: "War by no means absolves us from all obligations toward the enemy. . . . They result in part from the object of war, in part from the fact that the belligerents are human beings, that the declaration of war is, among civilized nations, always made upon tacit acknowledgment of certain uses and obligations."<sup>94</sup>

In accordance with the Code:

[M]ilitary necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge— . . . the unarmed person is to be spared in person, property, and honor as much as the exigencies of war will admit. . . . [P]rotection of the inoffensive citizen of the hostile country is the rule. . . . The United States acknowledge[s] and protect[s], in hostile country occupied by them, religion and morality; strictly private property; the persons of the



inhabitants, especially those of women; and the sacredness of domestic relations. Offenses in the country shall be rigorously punished. . . . All wanton violence committed against persons in the invaded country[;] . . . all robbery . . . or sacking, even after taking a place by main force, all rape, wounding, maiming or killing of such inhabitants, are prohibited under the penalty of death. . . . Crimes punishable by all penal codes, such as arson, murder, assaults, highway robbery, theft, burglary, fraud, forgery and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred.<sup>95</sup>

The Code also recognized that prisoners were to be protected and that it was forbidden to deny quarter. Further, the rights of chaplains and medical personnel were confirmed, as was the ban on any discrimination in the treatment of enemy personnel. It also forbade the use of enemy colors, which would now be considered as perfidy. While aimed at the conduct of American forces, the Code went further, acknowledging the right to punish what would today be described as war crimes: "A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities."<sup>96</sup> As to the problem of members of a force of an enemy State considered to be engaged in an "unjust" war,

[t]he law of nations . . . admits of no rules or laws different from those of regular warfare, regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider as a wanton and unjust assailant.<sup>97</sup> Modern wars are not internecine wars, in which the killing of the enemy is the object.<sup>98</sup> The destruction of the enemy in a modern war, and, indeed, modern war itself, are means to obtain the object of the belligerent which lies beyond the war. *Unnecessary or revengeful destruction of life is not lawful.*<sup>99</sup>

The rules enunciated in the Lieber Code were so consistent with current military practice that similar codes or manuals were soon issued by Prussia, the Netherlands, France, Russia, Serbia, Argentina, Great Britain, and Spain.<sup>100</sup> But there was no internationally agreed document setting out the rules and principles. However, to the extent that they and the writings of acknowledged international law authorities express agreement, they may be regarded as *opinio juris ac necessitatis*, thus constituting the customary law of armed conflict. Insofar as they have not been overruled by treaty or expressly rejected by a State, especially a significant military power, they are as obligatory as any other rules of international law.<sup>101</sup>

International efforts aimed at controlling activities in conflict had already begun in the middle of the nineteenth century. The Declaration of Paris of 1856<sup>102</sup> was concerned with some selected aspects of maritime warfare, but more significant was the 1864 Geneva Convention for the Amelioration of the Wounded in Armies in the Field.<sup>103</sup> Adopted only one year after the establishment of the International Committee of the Red Cross, it recognized the immunity of the symbol and those wearing it. This Convention initiated a series of Geneva Conventions (1906, 1929, and 1949, culminating in the Protocols of 1977) directed at the treatment and protection of those *hors de combat*—the wounded on land or at sea, prisoners of war, civilians and other noncombatants—and known as the Geneva Law or international humanitarian law.

As to the methods of warfare, the first international effort at control was the 1868 Declaration of St. Petersburg directed against the use of lightweight explosive bullets,<sup>104</sup> and it is worth noting the motive for such ban, as expressed in the Preamble:

[H]aving by common agreement fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity . . . [the parties] declare . . . That the progress of civilization should have the effect of alleviating as much as possible the calamities of war; That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; That the employment of such arms would, therefore, be contrary to the laws of humanity.<sup>105</sup>

With these lofty motives in mind, the Declaration banned their use on a reciprocal basis among those States which adhered to the Declaration. In fact, only nineteen European States did so.

Even fewer States attended the 1874 Brussels Conference that drew up a Project of an International Declaration Concerning the Laws and Customs of War. This postulated principles concerning the administration of occupied territory, the distinction between combatants and noncombatants, the conduct of sieges and bombardments, as well as the treatment of spies, prisoners of war, and the sick and wounded. While the Project never came into force, we should not overlook the reiteration of the preambular terms of St. Petersburg, nor the even more significant statement that:

by revising the laws and general usages of war, whether with the object of defining them with greater precision, or with the view of laying down, by a common agreement, certain limits which will restrain, as far as possible, the severities of war, [war] . . . would involve less suffering, would be less liable to those aggravations produced by uncertainty, unforeseen events, and the passions excited by the struggle; it would tend more surely to that which should be its final objective, viz., the re-establishment of good relations, and a more solid and lasting peace between the belligerent States.<sup>106</sup>

The Project embodied a principle which is to be found in every treaty since. By Article 12,

[T]he laws of war do not recognize in belligerents an unlimited power in the adoption of means of injuring the enemy . . . [and, Article 13, a]ccording to this principle [the following acts] are especially *forbidden*:<sup>107</sup>

- (a) Employment of poison or poisoned weapons;
- (b) Murder by treachery of individuals belonging to the hostile nation or army;
- (c) Murder of an enemy who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
- (d) The declaration that no quarter will be given;
- (e) The employment of arms, projectiles or missiles calculated to cause unnecessary suffering [now understood objectively as relating to what is necessary for the achieving of an operation rather than subjectively as measured by the individual on whom the suffering has been inflicted<sup>108</sup>], as well as the use of projectiles prohibited by the Declaration of St. Petersburg of 1868;
- (f) Making improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;
- (g) Any destruction or seizure of the enemy's property that is not imperatively demanded by the necessity of war.

Largely building upon the Brussels Project, at its 1880 meeting the Institute of International Law drew up the *Oxford Manual on the Laws of War*. Once again, what is of major significance and reason for the law of war is the Preface to the Manual:

War holds a great place in history, and it is not to be supposed that men will soon give it up—in spite of the protests which it arouses and the horror which it inspires—because it appears to be the only possible issue of disputes which threaten the existence of States, their liberty, their vital interests. But the gradual improvement in customs should be reflected in the method of conducting war. It is worthy of civilized nations “to restrain the destructive force of war, while recognizing its inevitable necessities.” The problem is not easy of



solution; however, some points have already been solved, and very recently the draft Declaration of Brussels has been a solemn pronouncement of good intentions of governments in this connection. It may be said that independently of the international laws existing on this subject, *there are today certain principles of justice which guide the public conscience, which are manifested even by general customs, but which it would be well to fix and make obligatory.* . . . The Institute does not propose an international treaty, which it might perhaps be premature or at least very difficult to obtain; but it believes it is fulfilling a duty in offering to the governments a *Manual suitable as the basis for national legislation in each State, and in accord with the progress of juridical science and the needs of civilized armies.* Rash and extreme rules will not be found therein. The Institute has not sought innovations in drawing up the *Manual*; it has contented itself with *stating clearly and codifying the accepted ideas of our age so far as this has appeared allowable and practicable.* By so doing, it believes it is rendering service to military men themselves. In fact so long as the demands of opinion remain indeterminate, belligerents are exposed to painful uncertainty and to endless accusations. *A positive set of rules . . . if they are judicious, serves the interests of belligerents and is far from hindering them, since by preventing the unchaining of passions and savage instincts—which battle always awakens, as much as it awakens courage and manly virtue—it strengthens the discipline which is the strength of armies; it also ennobles their patriotic mission in the eyes of the soldiers by keeping them within the limits of respect due to the rights of humanity.* But in order to attain this end it is not sufficient for sovereigns to promulgate new laws. It is essential, too, that they make these laws known to all people, so that when a war is declared, the men called to take up arms to defend the causes of the belligerent States, may be thoroughly impregnated with the special rights and duties attached to the execution of such a command.<sup>109</sup>

Only a few of the *Manual's* provisions need be mentioned, and that because they have, in almost identical wording, been embodied in the relevant treaties beginning with the Hague Conference of 1899.

The state of war does not admit of acts of violence, save between the armed forces of belligerent States. . . . *Every belligerent armed force is bound to conform to the laws of war. The laws of war do not recognize in belligerents an unlimited liberty as to the means of injuring the enemy. They are to abstain especially from all needless severity.* . . . No invaded territory is regarded as conquered until the end of the war; until that time the occupant exercises . . . only *de facto* power, essentially provisional in character. . . . *It is forbidden to maltreat inoffensive populations . . . or employ arms, projectiles, or materials of any kind calculated to cause superfluous suffering or to aggravate wounds . . . [or] to injure or kill an enemy who has surrendered at discretion or is disabled, and to declare in advance that quarter will not be given, even by those who do not ask it for themselves.*<sup>110</sup> Wounded and sick soldiers should be brought in and cared for, to whatever

nation they belong. . . . It is forbidden to rob or mutilate the dead lying on the field of battle. . . . It is forbidden to attack and to bombard undefended places. The commander of an attacking force, save in cases of open assault, shall, before undertaking a bombardment, make every due effort to give notice thereof to the local authorities.<sup>111</sup> . . . Ambulances and hospitals for the use of armies are recognized as neutral and should, as such, be protected and respected by belligerents, *so long as any sick or wounded are therein*.<sup>112</sup> . . . The occupant [of enemy territory] should maintain the laws which were in force in the country in time of peace, and should not modify, suspend, or replace them, unless necessary [this proviso would permit amendment if the said laws ran counter to the occupant's concept of moral conduct, so long as that was in conformity with accepted concepts of justice]. . . . The population of the invaded district cannot be compelled to swear allegiance to the hostile Power. . . . Family honour and rights, the lives of individuals, as well as their religious convictions and practice, must be respected [again, this would not oblige an occupant to recognize practices repulsive to its own way of life]. . . . Prisoners of war are in the power of the hostile government, but not in that of the individuals or corps who captured them. They are subject to the laws and regulations in force in the army of the enemy. They must be humanely treated. . . . Arms may be used, after summoning, against a prisoner attempting to escape. . . . Prisoners cannot be compelled in any manner to take any part whatever in the operation of war,<sup>113</sup> nor compelled to give information about their country or their army. *Offenders against the laws of war are liable to the punishment specified in the penal law*.<sup>114</sup>

The penal law cited in the final quoted sentence would be the national law, no provision for trial by any international tribunal having been made. Nor was any obligation imposed requiring a national force to hand an accused offender to the enemy so that he could be tried by an enemy tribunal.

Perhaps at this point it would be in order to comment upon the views as to the law of war of one or two of the major players in international armed conflict. According to Great Britain,

[t]he laws of war are the rules which govern the conduct of war—rules with which, according to international law, belligerents and neutrals are bound to comply. *They are binding not only upon States as such but also upon their nationals and, in particular, upon the individual members of the armed forces*. In antiquity, and in the earlier part of the Middle Ages, no rules of warfare existed.<sup>115</sup> During the latter part of the Middle Ages, however, the influence of Christianity as well as that of chivalry made itself felt, and gradually the practice of warfare became less savage. The present laws of war are the result of a slow growth. Isolated milder practices became in the course of time usages, which at first were not



accompanied by a sense of legal obligation, but which by custom (i.e., constant practice accepted as law) and by treaties, gradually developed into legal rules. . . . The laws of war consist, therefore, partly of customary rules which have grown up in practice, and partly of written rules, that is to say, rules which have been expressly agreed upon by governments in international treaties and conventions. . . . The development of the law of war has been determined by three principles: first, the principle that a belligerent is justified in applying compulsion and force of any kind, to the extent necessary for the realisation of the purpose of war, that is, the complete submission of the enemy at the earliest possible moment with the least possible expenditure of men, resources and money; secondly, the principle of humanity, according to which kinds and degrees of violence which are not necessary for the purpose of war are not permitted to a belligerent; and, thirdly, the principle of chivalry, which demands a certain amount of fairness in offence and defence, and a certain mutual respect between the opposing forces. The law of war is inspired by the desire of all civilised nations to reduce the evils of war by: (a) protecting both combatants and non-combatants from unnecessary suffering; (b) safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians, and (c) facilitating the restoration of peace.<sup>116</sup>

Although the United States manual, *The Law of Land Warfare*, is almost identical in its wording,<sup>117</sup> it stresses a point not included in the British statement of underlying general principles:

The prohibitory effect of the law of war is not minimized by "military necessity[.]" which has been defined as the principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. Military necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity.<sup>118</sup>

Since both manuals refer to the importance of customary as well as conventional law, it is useful to cite the comments in the United States text on the sources of the law of war:

The law of war is derived from two principal sources:

(a) *Lawmaking Treaties (or Conventions)*, such as the Hague and Geneva Conventions.

(b) *Custom*. Although some of the law of war has not been incorporated in any treaty or convention to which the United States is a party, this body of unwritten or customary law is firmly established by the custom of nations and well defined by recognized authorities on international law. Lawmaking treaties may be compared



with legislative enactments in the national law of the United States and the customary law of war with the unwritten Anglo-American common law.<sup>119</sup>

Despite this statement, it is not always easy to determine what a particular State recognizes as customary law. This may be seen if we refer to the United States attitude to the use of poison gas. As already indicated, poison of any kind was regarded as illegal from earliest times and particularly in the writings of the “fathers” of international law. Moreover, by the Geneva Protocol of 1925,<sup>120</sup> to which by the outbreak of World War II there were forty parties, with the United States and Japan as the only major powers not ratifying or acceding, the use of poisonous gas and bacteriological warfare was prohibited. Paragraph 38 of the United States manual states:

The United States is not a party to any treaty, now in force, that prohibits or restricts the use in warfare of toxic or noxious gases, of smoke or incendiary materials, or of bacteriological warfare. . . . The Geneva Protocol for the prohibition of the use in war of asphyxiating, poisonous, or other gases, and of bacteriological methods of warfare, . . . has been ratified or adhered to by and is now effective between a considerable number of States. *However, the United States Senate has refrained from giving its advice and consent to the ratification by the United States, and it is accordingly not binding upon this country* [emphasis added].

On the other hand, the United States Naval War College was of the opinion that the “use of poisonous gases and those that cause unnecessary suffering is in general prohibited;”<sup>121</sup> in 1943, during World War II, President Franklin D. Roosevelt stated, in response to reports “that the Axis powers are making significant preparations indicative of [an] intention . . . to loose upon mankind such terrible and inhumane weapons [, that] . . . *use of such weapons has been outlawed by the general opinion of civilized mankind*. This country has not used them, and I hope that we will never be compelled to use them. I state categorically that we shall under no circumstances resort to the use of such weapons unless they are first used by our enemies.”<sup>122</sup> Despite the apparent incompatibilities, the United States acceded to the Protocol in 1975, and the Field Manual was amended.<sup>123</sup> The amendment includes the introductory comment, “Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilised world”—words which had already appeared in the text of the Protocol and repeated by the president in 1943! It would appear, however, that the official view of the Department of the Army is that gas is forbidden by conventional and not by customary law.

While it is true that the manuals referred to are concerned with land warfare, the principles enunciated are of general application and equally significant as basic principles underlying air and maritime warfare.

By way of contrast, and reflecting the views of Clausewitz,<sup>124</sup> reference might be made to the Introduction of the *German War Book*:

[T]he "argument of war" permits every belligerent State to have recourse to all means which enable it to attain the object of the war; still, practice has taught the advisability of allowing in one's own interest the introduction of a limitation in the use of certain methods of war and a total renunciation of the use of others. Chivalrous feelings, Christian thought, higher civilization and, by no means least of all, the recognition of one's own advantage, have led to a voluntary and self-imposed limitation, the necessity of which is today tacitly recognized by all States and their armies. They have led in the course of time, in the simple transmission of knightly usage in the passages of arms, to a series of agreements, hallowed by tradition, and we are accustomed to sum these up in the words "usage of war" [*Kriegsbrauch*], "custom of war" [*Kriegssitte*], or "fashion of war" [*Kriegsmanier*]. Customs of this kind have always existed, even in the times of antiquity; they differed according to the civilization of the different nations and their public economy, they were not always identical, even in one and the same conflict, and they have in the course of time often changed; they are older than any scientific law of war, they have come down to us unwritten, and moreover they maintain themselves in full vitality; they have, therefore, won an assured position in standing armies according as these latter have been introduced into the systems of almost every European State. The fact that such limitations of the unrestricted and reckless application of all the available means for the conduct of war, and thereby the humanization of the customary methods of pursuing war, really exist, and are actually observed by the armies of all civilized States, has in the course of the nineteenth century often led to attempts to develop, to extend, and thus to make universally binding these pre-existing usages of war; to elevate them to the level of laws binding nations and armies, in other words to create a *codex belli*; a law of war. All these attempts have hitherto, with some few exceptions . . . , completely failed. If, therefore, in the following work the expression "the law of war" is used, it must be understood that by it is meant not a *lex scripta* introduced by international agreements [although Germany had become a party to the Hague Conventions in 1909], but only a reciprocity of mutual agreement; a limitation of arbitrary behaviour, which custom and conventionality, human friendliness and a calculating egotism have erected, but for the observance of which there exists no express sanction, but only "the fear of reprisals" decides. Consequently, the usage of war is even now the only means of regulating the relations of belligerent States to one another. But with the idea of the usages of war will always be bound up the character of something transitory, inconstant, something dependent on factors outside the army. Nowadays it is not



only the army which influences the spirit of the customs of war and assures recognition of its unwritten laws. Since the almost universal introduction of conscription, the peoples themselves exercise a profound effect upon this spirit. In the modern usages of war one can no longer regard merely the traditional inheritance of the ancient etiquette of the profession of arms, and the professional outlook accompanying it, but there is also the deposit of the currents of thought which agitate our time. But since the tendency of thought of the last century was dominated essentially by humanitarian considerations which not infrequently degenerated into sentimentality and flabby emotion, there have not been wanting attempts to influence the development of the usages of war in a way which was in fundamental contradiction with the nature of war and its object. Attempts of this kind will also not be wanting in the future, the more so as these agitations have found a kind of moral recognition in some provisions of the Geneva Convention and the Brussels and Hague Conferences. Moreover, the officer is a child of his time. He is subject to the intellectual tendencies which influence his own nation; the more educated he is the more will this be the case. The danger that, in this way, he will arrive at false views of the essential character of war must not be lost sight of. The danger can only be met by a thorough study of war itself. By steeping himself in military history an officer will be able to guard himself against excessive humanitarian notions, it will teach him that certain severities are indispensable to war, nay more, that the only true humanity very often lies in a ruthless application of them.<sup>125</sup>

The somewhat cynical and cavalier attitude to the law of war expounded here finds its application as recently as 1941 in the reply of Field Marshal Wilhelm Keitel to the warning by Admiral Wilhelm Canaris that the German treatment of Soviet prisoners of war was contrary to international law: "The objections arise from the military concept of chivalrous warfare. This is the destruction of an ideology."<sup>126</sup>

Regardless of the German point of view, it is generally accepted that the binding law of war today finds its origins in the Geneva and Hague conventions. The latter are the product of the Conferences of 1899 and 1907 called at the initiative of Czar Nicholas II, and the principles established there underlie what is now known as the "Law of the Hague." In 1899, in addition to the Declaration against soft-nosed explosive bullets already referred to, there appeared a ban on the diffusion of asphyxiating or deleterious gases, as well as the first elementary effort to deal with aerial warfare by banning the launching of projectiles from balloons.<sup>127</sup> For the main part, these Declarations were regarded as temporary pending the calling of a third Hague Conference, which has never taken place. However, even though not all the powers have ratified



or acceded thereto, the general view is that they express rules of customary law. That this is so is demonstrated by the Judgment of the International Military Tribunal at Nuremberg with its comment:

Several of the belligerents in the recent war were not parties to the [IVth] Convention. . . . [B]y 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war. . . . The argument in defence of the charge with regard to the murder and ill-treatment of Soviet prisoners of war, that the U.S.S.R. was not a party to the Geneva Convention is quite without foundation. On the 15th September 1941 Admiral Canaris protested against the regulations for the treatment of Soviet prisoners of war. . . . He then stated[,] "The Geneva Convention for the treatment of prisoners of war [to which the Soviet Union was not a party] is not binding in the relationship between Germany and the U.S.S.R.; therefore only the principles of general international law on the treatment of prisoners of war apply. Since the 18th century, these have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war. This principle developed in accordance with the view held by all armies that it is contrary to military tradition to kill or injure helpless people. . . . The decrees for the treatment of Soviet prisoners of war enclosed are based on a fundamentally different view-point." This protest which correctly stated the legal position, was ignored.<sup>128</sup>

It is now apt that reference be made to Convention II of 1899, as amended as Convention IV in 1907. Many of its basic principles, and especially the Preamble, are applicable *mutatis mutandis* in any theater of war:

Seeing that, while seeking means to preserve peace and prevent armed conflict between nations, it is likewise necessary to bear in mind the cases where the appeal to arms has been brought about by events which their care was unable to avert; Animated by the desire to serve, even in this extreme case, *the interests of humanity and the ever progressive needs of civilization*; Thinking it important, with this object, to revise the general laws and customs of war, either with a view to defining them with greater precision *or to confirming them, within such limits as would mitigate their severity as far as possible*. . . . [T]hese provisions, *the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants*. It has not, however, been found possible at present to concert regulations covering all the circumstances which arise in practice. On the other hand, the High Contracting Parties clearly do not intend that unforeseen cases should, in the

absence of a written undertaking, be left to the arbitrary judgment of military commanders. *Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not in the Regulations adopted by them [and annexed to the Convention] the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.*<sup>129</sup>

The last sentence is known as the Martens Clause, after the Russian foreign minister who introduced it. Its purpose was to deal with any lacunae or unexpected situation that might arise, thereby preventing the possibility of any belligerent contending that its actions were legitimate since they were not expressly forbidden by the Convention. Today, it is understood to apply to every armed conflict and tends to be embodied, either directly or by way of paraphrase, in every treaty concerning the conduct of hostilities. Thus, Article 1, paragraph 2, of Protocol I, 1977, provides: "In cases not covered by the Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience." Embodying the principle in the actual body of the Protocol rather than, as had been the practice formerly, in the Preamble, ensures that it has been elevated to become part of the mandatory law. It is unfortunate, however, that no attempt has been made to define what constitutes "the principles of humanity and the dictates of the public conscience." Presumably, it is assumed that these are so well known and so generally accepted as to render definition superfluous. Interestingly enough, in the case of Protocol II dealing with non-international conflicts, the Clause remains part of the Preamble. Since this is the first treaty effort to deal with such conflicts, other than the short mini-bill of rights found in Article 3 common to the four 1949 Conventions, the reference to "established custom" has, perhaps not unreasonably, been omitted.

In accordance with general treaty practice at the time, the Hague Conventions contain a "general participation" clause, the effect of which is to ensure that the Convention only applies during a conflict in which all the belligerents are parties to the Convention claimed to be applicable. This would mean that if any belligerent, however insignificant, even one only nominally a party to the conflict but not contributing any forces or materiel, has not acceded to the Convention, it would not be applicable even though the "real" belligerents were all apparently bound thereby. This failing tended to give added significance to the Martens Clause, with its reference to custom and the



like. Moreover, the “real” belligerents in such circumstances have tended to apply the Convention as between themselves,<sup>130</sup> while to the extent that the Convention reproduces customary law<sup>131</sup> or is regarded as having hardened into such custom (as explained by the Nuremberg Tribunal),<sup>132</sup> the “general participation” clause has lost its significance; in fact, it is no longer used. Instead, as is made clear in the 1949 Conventions, the present law operates “in all circumstances . . . [and a]lthough one of the Parties in conflict may not be a Party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations . . . [and] in relation to the said Power, if the latter accepts and applies the provisions thereof.”<sup>133</sup>

While the Hague and Geneva Conventions applied in both world wars, it should be borne in mind that in none of them was any provision made for the trial of individual offenders. The only reference to “liability” in the then-existing black-letter law was Article 3 of Hague Convention IV, which provided that “a belligerent party which violates the provisions of the regulations shall, if the case demand, be liable to pay compensation. . . . It shall be responsible for all acts committed by persons forming part of its armed forces.” It is on the basis of this provision that former prisoners of the Japanese are seeking to recover personal compensation<sup>134</sup>—regardless of the fact that unless it is clearly provided otherwise, only the States parties to the treaty acquire enforceable rights thereunder<sup>135</sup> and even though the Peace Treaty with Japan<sup>136</sup> liquidated personal claims, thus invalidating any claim that might have been created under the 1907 Convention.

Although the Convention provides for state responsibility which, in accordance with the normal rules of international law, amounts to an international tort resulting from breach of treaty, it says nothing about the liability of any officer ordering, nor of personal responsibility of any individual committing, a breach. Therefore, until the establishment of the International Military Tribunals at Nuremberg and Tokyo at the end of World War II, all trials of persons charged with committing breaches of the laws and customs of war were conducted by national tribunals<sup>137</sup> applying customary international law,<sup>138</sup> the Hague Regulations,<sup>139</sup> or, in the case of their own personnel, the national military or criminal code.<sup>140</sup>

It is sufficient for our purposes merely to mention the offenses within the jurisdiction of the International Tribunals without going into excessive detail. By the London Charter establishing the Nuremberg Tribunal,<sup>141</sup> jurisdiction was granted over crimes against peace, war crimes, and crimes against humanity; the same was done in the case of the Tokyo tribunal. More important perhaps than the judgments, was the General Assembly’s Resolution



affirming the Principles of International Law Recognized by the Charter of the Tribunal,<sup>142</sup> especially as these were spelled out by the International Law Commission in 1950:

I. Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

II. The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

III. The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

IV. The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

V. Any person charged with a crime under international law has the right to a fair trial on the facts and law.

VI. The crimes hereinafter set out are punishable as crimes under international law:

(a) Crimes against peace. . . .

(b) War crimes. . . .

(c) Crimes against humanity. . . .

VII. Complicity in the commission of a crime against peace, a war crime, or a crime against humanity . . . is a crime under international law.<sup>143</sup>

Perhaps it should be pointed out here that while the Principles deal explicitly with superior orders, they do so only implicitly in so far as the counterpart of command responsibility is concerned.<sup>144</sup> By way of contrast, Protocol I is silent on superior orders,<sup>145</sup> but very specific on command responsibility.<sup>146</sup> Moreover, the Protocol has made it difficult for any superior to claim that he was unaware of the law, since Article 82 requires legal advisers to be "available, when necessary, to advise military commanders at the appropriate level<sup>147</sup> on the application of the Conventions and the Protocol [as well as] on the appropriate instruction to be given to the armed forces on this subject."

The significance of the Nuremberg Judgment may be seen in the manner in which subsequent national war crimes tribunals have referred to and applied the principles stemming from that Judgment.<sup>148</sup> It has equally proved significant in the jurisprudence of the *ad hoc* Tribunal established for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, particularly in relation to the concept of crimes against humanity.<sup>149</sup>

A problem that confronts the ordinary man in the field is the legality of weaponry. Some weapons are considered to be illegal *per se*, particularly those which have become outdated, such as boiling oil (effective against besieging forces) or those useful in dismounting knights in armor, such as the club, battle axe, ball and chain, or heavy lance.<sup>150</sup> While a combatant would probably not be held liable merely because he used the weapons issued to him, since he would almost certainly not know what type of ammunition was in fact permitted, it would be illegal for him, and subject him to trial, to alter the weapons issued so as to cause injuries likely to result in unnecessary suffering, which is forbidden in every text relating to conduct *in bello*.

Relatedly, particular States have occasionally sought to ban or declare illegal the employment of "barbarian" forces. Thus, the *German War Book* condemned as "closely connected with the unlawful instruments of war the employment of uncivilized and barbarous peoples in European wars. . . . The transference of African and Muhammedan Turcis to a European seat of war by the French in the year 1870 was . . . a retrogression from civilized to barbarous warfare, as these troops had and could have no conception of European-Christian culture, of respect for property, and the honour of women, etc."<sup>151</sup> Today it is clear that such discrimination would be completely contrary to the law, and the modern soldier must on no account discriminate among enemy personnel on the basis of sex, race, nationality, religion, political opinion or any other criteria.<sup>152</sup> In other words, in accordance with the basic humanitarian principles on which the law of armed conflict rests, all members of an adverse party are entitled to equal protection. However, by Article 47 of Protocol I, this basic principle of non-discrimination does not extend to mercenaries, who are denied the status of lawful combatants and are therefore not regarded as prisoners of war if captured.<sup>153</sup>

Since the adoption of Protocol II annexed to the 1980 Convention on Prohibition or Restriction on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects, the placing of booby traps—probably one of the easiest weapons for the individual man in the field to make for himself—is illegal if employed as a reprisal against civilians or indiscriminately placed so that it "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof."<sup>154</sup> It would not, however, be an offense for him to booby-trap a building that has been evacuated by civilians and which he reasonably anticipates is likely to be occupied by members of the adverse party's armed forces.



Other than the Conventional Weapons Convention, as amended, little by way of treaty has been introduced to expand the scope of the law of war beyond what is to be found in the Hague and Geneva Law. Perhaps the major development of 1949, arising from the experience of occupied Europe during World War II, was the adoption of Convention IV<sup>155</sup> relating to the protection of civilians in occupied territory, although all that need be said of it here is that it introduced criminal liability for those committing grave breaches against such “protected” persons. The principal innovation of the four Conventions, however, was the introduction of Article 3 into each of them. This promulgated a minimal statement of rights that would apply even in a non-international armed conflict. It is of interest to mention that the majority of the Trial Chamber of the *ad hoc* Tribunals for the former Yugoslavia in the *Tadić* case, while recognizing the significance and application of Article 3, rejected in the particular circumstances of that case the contention that the Conventions, including the Civilians Convention, were applicable.<sup>156</sup> Some effort had been made in 1977, with the adoption of Protocol I,<sup>157</sup> to extend the law to certain conflicts previously regarded as non-international. By Article 1, paragraph 4, wars of national liberation were raised to the level of international armed conflicts governed by the provisions of the law of war, although by Article 44, paragraph 3, protection is given to those who might be described as “farmers by day and combatants by night,” provided they “carry their arms openly” during an engagement or while visible to the adversary during deployment preparatory to launching an attack.

Extending the effort to humanize non-international conflicts, in which traditionally the horrors are frequently far more grave and extensive than they are in international conflicts, Protocol II<sup>158</sup> elaborates some measures of humanitarian law which are applicable in a non-international conflict not amounting to a war of national liberation, which would fall within the purview of Protocol I. While Protocol II forbids a variety of acts, it makes no provision for punishment of breaches. Nor for that matter is common Article 3 of the Conventions, which also deals with non-international conflicts, included in any of the lists of grave breaches in the four Conventions or in Protocol I. This would imply that there is no way to deal with breaches of the law if committed during a non-international conflict. However, since both Protocol II and common Article 3 forbid certain types of action, it must be presumed that the intention is that such activities must be amenable to trial and punishment. Further, it should be noted that most of the acts forbidden by Protocol II, and especially those listed in common Article 3, would, when directed against humans, almost certainly amount to crimes against humanity, thus giving rise



to universal jurisdiction. Moreover, the Statutes of both the *ad hoc* tribunals established to deal with breaches of the law occurring in Rwanda and the former Yugoslavia clearly envisage criminal jurisdiction as being applicable to such conflicts,<sup>159</sup> although the Judgment of the Trial Chamber in the *Tadić Case*<sup>160</sup> has apparently reduced the significance of the Conventions in such conflicts.

Among other developments in the law introduced in 1977—which to some extent bring the modern law into line with such ecological injunctions as those relating to the immunity of trees and the like in the Old Testament—are those relating to protection of the natural environment. By Article 55 of Protocol I “[c]are shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health and survival of the population.” Even more in direct line with the Old Testament or the military codes of the feudal period is Article 54, whereby it is forbidden “to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population of the adverse Party, whatsoever the motive.”

Perhaps most likely to affect adversely the environment and cause widespread, long-term, and severe damage are nuclear weapons. However, since the Intentional Committee of the Red Cross and the major powers considered the issue to be one of disarmament rather than means or methods of warfare, the Protocol does not deal with them in any way. It does, however, grant protection to “works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations.”<sup>161</sup>

However, there have been some developments outside of treaty in relation to nuclear weapons. In 1996, the International Court of Justice handed down its Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons*.<sup>162</sup> Pointing out that because it could not find “a conventional rule of general scope, nor a customary rule specifically proscribing the threat or use of nuclear weapons *per se*, it [became necessary to deal] with the question whether recourse to nuclear weapons must be considered as illegal in the light of the principles and rules of international humanitarian law applicable in armed

conflict,"<sup>163</sup> bearing in mind the continued significance of the Martens Clause. The court noted that

humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effects on combatants and civilians or because of the unnecessary suffering caused to combatants,<sup>164</sup> that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. If an envisaged use of weapons does not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law. . . . [Moreover,] these fundamental rules [embodied in the Hague and Geneva Conventions] are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.<sup>165</sup>

Inasmuch as it has been suggested that the accepted rules were irrelevant since they developed before the invention of nuclear weapons, the Court noted that the conferences of 1949 and 1994-1997 left these weapons aside, and accepted that

there is a qualitative difference between nuclear weapons and all conventional weapons. However, it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflicts did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.<sup>166</sup>

Having thus emphasised the validity of the rules of international humanitarian law, it is perhaps not surprising that the Court found itself unable to:

make a determination on the validity of the view that the recourse to nuclear weapons would be illegal in any circumstances owing to their inherent and total incompatibility with the law applicable in armed conflict. Certainly, . . . the principles and rules of law applicable in armed conflict—at the heart of which is the overriding consideration of humanity—make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons, . . . the use of such weapons in fact seems scarcely reconcilable with respect for such requirements. Nevertheless, the Court considers that it does not have sufficient



elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules applicable in armed conflict in any circumstance. . . .<sup>167</sup>

In the light of this reasoning, the Court concluded that it

cannot lose sight of the fundamental right of every State to survival, and thus the right to resort to self-defence, in accordance with Article 51 [of the Charter], when survival is at stake. . . . Accordingly, in view of the present state of international law viewed as a whole, the Court is led to observe that it cannot reach a definite conclusion as to the legality or use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake. . . .<sup>168</sup>

All one can say on the basis of the Court's Opinion is that the use or threat to use a nuclear weapon would be contrary to the principles of international humanitarian law and therefore illegal. However, in circumstances in which a state may feel—and this is a matter of pure auto-interpretation for the State itself—that its very survival is at stake, then a recourse to the use of this weapon might nevertheless be lawful!

Just as there is no black-letter law with regard to nuclear weapons, so there is no treaty law concerning aerial warfare. However, in 1923 a Committee of Experts drew up a code of draft Rules of Air Warfare<sup>169</sup> which are generally regarded as, "to a great extent, correspond[ing] to the customary rules and general principles underlying the conventions on the law of war on land and at sea."<sup>170</sup> We also find in the decision of the Nagasaki District Court, when considering the legality of the atomic attacks on Hiroshima and Nagasaki, some judicial comment to support this view:

The Draft Rules of Air Warfare cannot directly be called positive law, since they have not yet become effective as authoritative with regard to air warfare. However, international jurists regard the Draft Rules as authoritative with regard to air warfare. Some countries regard the substance of the rules as a standard of action by armed forces, and the fundamental principles of the Draft Rules are consistently in conformity with international law regulations and customs at the time. Therefore, we can safely say that the prohibition of indiscriminate aerial bombardment on an undefended city and the principle of military objective which are provided by the Draft Rules, are international customary law [allowing for developments in terminology, this finding has much in common with the Opinion of the World Court], also from the point that they are in common with the principle in land and sea warfare. Further, since the



distinction of land, sea and air warfare is made by the place and purpose of warfare, *we think that there is also sufficient reason for argument that, regarding the aerial bombardment of a city on land, the laws and regulations respecting land warfare analogically apply since the aerial bombardment is made on land.*<sup>171</sup>

This last statement prophetically foretells Article 49 of Protocol I, which is part of the Section (Part IV, Section I) relating to General Protection against Effects of Hostilities, and is itself concerned with the definition of attacks and scope of application. By paragraph 3, “[t]he provisions of this Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.”

From what has been said herein, it is clear that since earliest times there has been recognition that humanity and the future survival of society demand that limitations be placed upon the means and methods of warfare, and that this remains the case today, whether the hostilities take place in international or non-international conflicts. As is made clear by the Martens Clause, which the World Court has indicated is just as significant today as it was when Martens introduced it, when seeking the law of war it is not enough to look merely at the written documents which have been drawn up and accepted by States as treaties. These may be considered as reflecting what has developed in practice as representing what States are prepared to impose upon their armed forces by way of restrictions on their freedom of action. Although it may not always be easy to ascertain what are claimed to be the customary rules in this regard, the principles of humanity and the dictates of public conscience, taken together with consideration of the accepted practices of the most significant military forces, are probably sufficiently well known and accepted to provide the guidance necessary to understand what is meant by those terms. Despite the fact that modern tribal wars seem to suggest that what was formerly regarded as being almost universally accepted behavior may not now be so considered, it may be suggested that the principles referred to are no more or less than what Article 38 of the Statute of the International Court of Justice refers to as general principles of law recognized by civilized nations—even though they may be nothing more than the principles which “we and our friends, all of whom are civilized,” generally recognize as constituting principles of law and as such binding!

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Notes

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1. CLAUSEWITZ, ON WAR, bk. I, ch. 1, para. 2; ch. 2, p. 90; ch. 1, paras. 2 & 3 (Howard & Paret eds., 1976) (emphasis in original).
2. DEPT OF DEFENSE, REPORT TO CONGRESS, CONDUCT OF THE PERSIAN GULF WAR, Apr. 10, 1992, app. O, reprinted in 31 I.L.M. 612, 615 (1992).
3. See, e.g., REGOUT, LA DOCTRINE DE LA GUERRE JUSTE (1935); Santoni, *Nurturing the Institution of War: Just War Theory's Justifications and Accommodations*, in HINDE, THE INSTITUTIONS OF WAR (1991); WALZER, JUST AND UNJUST WARS (1977).
4. It was rare "that a good man should be found willing to employ wicked means." THE DISCOURSES, bk. I, ch. xviii (1532).
5. MACHIAVELLI, THE PRINCE xxvi (1513).
6. Treaty of Versailles, 1919, ch. 1, 12 B.F.S.P. 1; 13 AM. J. INT'L L. 2 (Supp. 1919); 2 ISRAEL, MAJOR PEACE TREATIES OF MODERN HISTORY, 1648-1967, at 1265 (1967).
7. See 1 FERENCZ, DEFINING INTERNATIONAL AGGRESSION 77 (1979).
8. *Id.* at 124.
9. *Id.* at 132.
10. Judgment, 1945, HMSO, Cmd. 6964, 39-41 (1946); 41 AM. J. INT'L L. 218-20 (1947); FERENCZ, *supra* note 7, at 486-8.
11. Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, art. 1, 94 L.N.T.S. 57, T.I.A.S. No. 796.
12. Reprinted in 29 AM. J. INT'L L. 93 (1935).
13. 1945. 82 U.N.T.S. 280, 59 Stat. 1544, reprinted in THE LAWS OF ARMED CONFLICTS 911 (Schindler & Toman eds., 1988).
14. Res. 95 (I), 1946, reprinted in *id.* at 921.
15. 1950. Reprinted in *id.* at 923.
16. See, e.g., DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 182-7 (1994).
17. *Id.* at 179-82.
18. See, e.g., Samuel 1:15, wherein the prophet himself kills Agag.
19. Deuteronomy 20: 10-14, 19-20.
20. Roberts, *Judaic Sources and Views on the Laws of War*, 37 NAVAL L.R. 221, 231 (1988); see also Green, *The Judaic Contribution to Human Rights*, 28 CAN. Y.B. INT'L L. 3 (1990).
21. Protocol Additional to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 10, 1977, art. 54, reprinted in Schindler & Toman, *supra* note 13, at 621 [hereafter Protocol I].
22. Proverbs 24: 21.
23. Proverbs 25: 21; 2 Kings 6: 22-23.
24. Roberts, *supra* note 20, at 233.
25. Written about the sixth century B.C. (Griffith trans., 1963) at 78-9.
26. KEEGAN, A HISTORY OF WARFARE, citing CREEL, THE ORIGIN OF STATECRAFT IN CHINA 257, 265 (1970).
27. Sanskrit epic composed in the third century B.C.
28. Epic Sanskrit poem based on Hindu ideals, probably composed between 200 B.C. and A.D. 200.

29. It was not until 1980 (with Protocols II and III annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects [Schindler & Toman, *supra* note 13, at 185]) that booby traps and incendiaries were placed under any form of restriction.

30. See *infra* for a discussion of weapons considered anathema to the Church.

31. See, e.g., Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. (1982).

32. It is not always easy to determine whether the enemy is retreating or merely withdrawing to re-form.

33. Act 4, Scene 7, ll.5–10. This statement relates to Henry's order to kill the French prisoners as a reprisal for the slaughter of the "boys." Shakespeare, seemingly, based his account on Holinshed's Chronicles, but a somewhat different version is found in VATTEL, *LE DROIT DES GENS*, liv. III, ch. VIII, s. 151 (1758). See also, generally, MERON, *HENRY'S WARS AND SHAKESPEARE'S LAWS* (1993).

34. See, e.g., GREEN, *ESSAYS ON THE MODERN LAW OF WAR*, ch. V (War Law and the Medical Profession) (1985).

35. All these examples are taken from Armour, *Customs and Warfare in Ancient India*, 8 TRANSACTIONS OF THE GROTIUS SOCIETY 71, 73–7, 81 (1922).

36. These terms are given to the two branches of the law of armed conflict, the Hague Law being the Conventions of 1899 and 1907, while the Geneva law refers to the Red Cross Conventions of 1949 as amended in 1977. The two together are commonly described as "humanitarian law."

37. 3 GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE*, 1776–1788, ch. 34, at 450 (Bury ed., 1909).

38. See, e.g., HOMER, *THE ODYSSEY*, 34, bk. I, ll. 260–63, 221–3 (Lattimore trans., 1965).

39. A similar tendency is to be found in modern civil wars.

40. 2 PHILLIPSON, *THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME* 195, 207–12, 221–3 (1911); see also THUCYDIDES, *THE PELEPONNESIAN WAR* 79 ff. (Hobbes trans., 1676).

41. See, GERMAN WAR BOOK, *infra* note 125, on use of colonial African troops in European wars.

42. TACITUS, *ANNALS* at i, 61.

43. This is the term used by Tacitus.

44. This does not accord with the treatment meted out to Britain after the defeat of Boudicca (or Boadicea).

45. LIVY, *HISTORY OF ROME* at v, 27.

46. CICERO, *DE OFFICIIS* at I, 11.

47. PHILLIPSON, *supra* note 40, at 227, 228–30.

48. ALIB HASAN AL MUTTAQUI, *4 BOOK OF KANZUL'UMMAN* 472 (1949); see also SHAYBANI'S SIYAR, *THE ISLAMIC LAW OF NATIONS*, sec. 1711 (c. early ninth century, Khadduri trans., 1966).

49. *Id.* at secs. 29–32, 47, 81, 110–11.

50. Khadduri, *supra* note 48, 13, secs. 2–38, 44, 54–60, 148–371.

51. Draper, *The Interaction of Christianity and Chivalry in the Historical Development of the Law of War*, 5 INT'L REV. RED CROSS 3, 19 (1965). Compare the attitude of Kapitanleutnant (Ing.) Lenz at his trial for war crimes in 1945, *The Peleus Trial*, 1 UNWCC, Law Reports of Trials of War Criminals 1, 3–4.

52. WRIGHT, *A STUDY OF WAR* 81 (1965).



53. For a satirical comment on the appearance of these warriors, see ERASMUS, *BELLUM* (1515) 17 (Imprint Soc. ed., 1972).

54. BELLI, *DE RE MILITARI ET BELLI TRACTATUS* (1563), pt. III, ch. III, p. 29 (Carnegie trans., 1936), citing the *CORPUS JURIS CANONICI* (1500). See also *THE ALEXIAD OF ANNA CONNENA* 316-7 (Sewter trans., 1969): "The crossbow is a weapon of the barbarians . . . a truly diabolical machine."

55. TREECE & OAKESHOTT, *FIGHTING MEN—HOW MEN HAVE FOUGHT THROUGH THE AGES* 207-8 (1963).

56. BELLI, *supra* note 54, at 29.

57. See, e.g., KEEN, *CHIVALRY* (1984); see also Gardot, *Le droit de la Guerre dans l'Oeuvre des Capitaines Francais du XVI Siècle*, 72 *HAGUE RECUEIL* 397, 416 (1948).

58. See, e.g., KEEN, *THE LAWS OF WAR IN THE LATE MIDDLE AGES* 27 (1965); see also CONTAMINE, *LAW IN THE MIDDLE AGES* 270-7 (Eng. trans., 1984); 2 WARD, *THE FOUNDATION AND HISTORY OF THE LAW OF NATIONS IN EUROPE*, ch. XIV ("Of the influence of chivalry") (1795).

59. KEEN, *supra* note 58, at 34.

60. *Id.* at 1.

61. SHAKESPEARE, *HENRY V*, act 4, scene 7, ll. 5-10. See generally MERON, *HENRY'S WARS AND SHAKESPEARE'S LAWS* (1993).

62. Literally "skinner," armed bands of free companies. KEEN, *LAWS*, *supra* note 58, at 192; see also *id.* at 97-100.

63. See 2 SCHWARZENBERGER, *2 INTERNATIONAL LAW: THE LAW OF ARMED CONFLICT*, ch. 39 (1968).

64. WINTHROP, *MILITARY LAW AND PRECEDENTS*, app. II (1886).

65. See, e.g., *THE ENGLISH LAWS AND ORDINANCES OF WARRE* 163, in 1 C.M. CLODE, *MILITARY FORCES OF THE CROWN*, app. VI (1869).

66. de Taube, *L'apport de Byzance au Developpement de droit international occidental*, 67 *HAGUE RECUEIL* 237 (1939).

67. Gardot, *supra* note 57, at 452-3, 469, citing FOURQUEVAUX, *LA DISCIPLINE MILITAIRE* (1592).

68. GENTILI, *DE JURE BELLI*, lib. II, cap. xxi, pp. 275, 251 (1612) (Carnegie trans., 1933).

69. Schindler & Toman, *supra* note 13, at 3, art. 37.

70. Res. 3318 (XXIX), art. 5, reprinted in *id.* at 295.

71. Protocol I, *supra* note 21, art. 76.

72. BELLI, *supra* note 54, pt. VII, cap. III, at 34.

73. BUTLER & MACCOBY, *THE DEVELOPMENT OF INTERNATIONAL LAW* 134 (1928).

74. *Id.* at 187, n. 28.

75. Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 1864, reprinted in Schindler and Toman, *supra* note 13, at 285.

76. BUTLER & MACCOBY, *supra* note 73, at 149-51.

77. For a general discussion of "War Law and the Medical Profession," see GREEN, *ESSAYS*, *supra* note 34, ch. VI.

78. On these distinctions and practices, see generally Stacey, *The Age of Chivalry*, in HOWARD ET AL., *THE LAWS OF WAR* 27, 32-8 (1994).

79. GENTILI, *supra* note 68, lib. II, cap. XVII, XVIII at 216-40.

80. *Id.*, lib. II, cap. III, VI, XXIII, at 142-4, 159, 272.

81. GROTIUS, *DE JURE BELLI AC PACIS* (1625), lib. III, cap. IV, secs. xviii, ix, x (Eng. trans., 1738), at 570, 564, 565; (Carnegie trans., 1925), at 654, 648, 649.

82. *Id.*, cap. XI.
83. *Id.*, sec. xix, at 649, 743.
84. *Id.* at 684-5, 788-9. *See also* Grumpelt (Scuttled U-boats) Trial, 13 I.L.R. 309 (1946).
85. *Id.*, secs. iv, v, pp. 686, 790-1.
86. VATTTEL, *LE DROIT DES GENS* (1798), liv. III, c.VIII, secs. 138-37 (Carnegie trans., 1916) (emphasis added). *See also* RUDDY, *INTERNATIONAL LAW IN THE ENLIGHTENMENT* 245-56 (1975).
87. GENTILI, *supra* note 68, sec. 39 at 280.
88. Not until the Prisoners of War Convention, 1929, art. 2, *reprinted in* Schindler & Toman, *supra* note 13, at 339, was this principle embodied in treaty law.
89. GENTILI, *supra* note 68, ss. 140, 142, 145-7, 155-7 at 280-3, 287, 289.
90. VATTTEL, *supra* note 86, liv. III, c.VIII, sec. 156, ch. IX, secs. 172-3, pp. 289, 294-5.
91. Protocol I, *supra* note 21.
92. In 1954 a Convention for the Protection of Cultural Property in the Event of Armed Conflict was adopted. *Reprinted in* Schindler & Toman, *supra* note 13, at 745.
93. General Orders No. 100, Apr. 24, 1863, *reprinted in* Schindler & Toman, *supra* note 13, at 3 [hereinafter Lieber Code]; *see also* Baxter, *The First Modern Codification of the Law of War*, 3 INT'L REV. RED CROSS 171 (1963).
94. LIEBER, *POLITICAL ETHICS* 657 (1838).
95. Lieber Code, *supra* note 93, arts. 16, 2, 37, 44, 47.
96. *Id.*, art. 59.
97. *See, e.g.,* Lauterpacht, *Rules of Warfare in an Unlawful War*, in *LAW AND POLITICS IN THE INTERNATIONAL COMMUNITY* 89 (Lipsky ed., 1953).
98. Modern civil wars, such as those in Bosnia or Rwanda, would appear to give the lie to this assertion.
99. Lieber Code, *supra* note 93, arts. 67-68 (emphasis added).
100. HOLLAND, *THE LAWS OF WAR ON LAND* 72-3 (1908).
101. *See, e.g.,* D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (1971); Akehurst, *The Hierarchy of the Sources of International Law*, 47 BRIT. Y.B. INT'L L. 273 (1974-1975); VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES* (1985) (esp. Part III).
102. Schindler & Toman, *supra* note 13, at 787.
103. *Id.* at 270.
104. *Id.* at 101.
105. The most "famous" of these is the "dumdum," invented by Great Britain at Dum-Dum, India. It was generally assumed that ordinary bullets, though they might kill, were not effective in stopping "the onrush of a hardy and fanatical savage." In 1903, Holland (Letter to THE TIMES, London May 2), maintained that their use was not unlawful so far as the United Kingdom and United States were concerned [LETTERS ON WAR AND NEUTRALITY 53 (1909)]; "it having been found in the British frontier wars that the impact of an ordinary bullet did not give shock sufficient to stop the onrush of certain assailants, so that the suffering caused to such assailants by their expansion in the body was not useless, and did not bring them within the condemnation of explosive bullets by the Declaration of St. Petersburg," WESTLAKE, *INTERNATIONAL LAW*, pt. II (War) 78 (1913). The United Kingdom "withdrew Dum-Dum bullets during the South African War, and it is to be taken for granted that Great Britain will not in future make use of them in a war with civilized Powers," 2 OPPENHEIM, *INTERNATIONAL LAW*, sec. 112 (1st ed. 1906), leaving open whether he considered their use against "uncivilized" powers to be lawful. Now that many police forces are being permitted to use such explosive bullets against their own nationals, and since it is often argued that these weapons are less destructive than ordinary rounds, it may well be



that the ban will fall into desuetude, especially as other explosive weapons, like grenades and mines, are still permitted.

106. Schindler & Toman, *supra* note 13, at 25 (emphasis added).

107. Emphasis in original.

108. See, e.g., BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS 195 (1982): "The Principle of Humanity complements the principle of necessity by forbidding those measures of violence which are not necessary (i.e., relevant and proportionate) to the achievement of a definite military objective."

109. Schindler & Toman, *supra* note 13, at 35 (emphasis added).

110. Such a rule would have been important for the Imperial Japanese Army, whose members regarded surrender or capture as the act of a coward not entitled to treatment as an honorable soldier.

111. In fact, prior to the use of the atomic bombs in 1945, radio messages were broadcast to the Japanese authorities naming a number of cities likely to be heavily bombed and advising evacuation of the civilian populations.

112. Does this mean that an unoccupied hospital, though marked with a Red Cross, is not protected? The Manual makes no reference to the status of civilian hospitals in a city subject to bombardment.

113. Thus, the pressure methods used against members of the British Indian Army by the Japanese in World War II to compel them to join the Indian National Army were clearly contrary to the law of war. See Green, *The Indian National Army Trials*, 11 MODERN L. REV. 47 (1948), and *The Problems of a Wartime International Lawyer*, 2 PACE Y.B. INT'L L. 93 (1989).

114. Arts. 1, 3, 4, 6–10, 19, 32, 33, 35, 44, 47, 49, 61–3, 68, 70 (emphasis added).

115. As has been seen, however, this is not completely correct, even though there may have been no written rules generally accepted.

116. H.M.S.O., THE LAW OF WAR ON LAND (Part III of the Manual of Military Law) 1-3 (1958).

117. DEPT OF THE ARMY, THE LAW OF LAND WARFARE (FM [Field Manual] 27–10) (1956). *But see* paras. 137, 630, 633.

118. In practice, most States ensure that their military advisers are apprised of any proposals that may be suggested for inclusion in a treaty concerning armed conflict. Many delegations to such conferences include representatives of the armed forces.

119. Para. 4.

120. 94 L.N.T.S. 65; Schindler & Toman, *supra* note 13, at 115.

121. NAVAL WAR COLLEGE, INTERNATIONAL LAW SITUATIONS 106 (1935). *See also id.* at 102; HYDE, 3 INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1820 (1947).

122. DEPT. OF STATE BULL., vol.VIII, no. 207, June 12, 1943 (emphasis added).

123. FM 27–10, *supra* note 117, change 1, July 15, 1976.

124. *See supra* note 1.

125. GERMAN WAR BOOK 52–4 (Morgan trans., 1915).

126. Nuremberg Judgment, *supra* note 10, at 91.

127. For a general discussion on the law concerning aerial warfare, see GREEN, ESSAYS, *supra* note 34, ch.VII (1985).

128. *Supra* note 126, at 65, with regard to the Hague, and 48 with regard to Geneva. *See also* 41 AM. J. INT'L L. 177, 248–9 (1947) & 48 AM. J. INT'L L. 228–9 (1954) respectively.

129. Schindler & Toman, *supra* note 13, at 63 (emphasis added).



130. See, e.g., the English prize cases, *The Möwe* [1915] and *The Blonde* [1922], A.C. 313, in each of which Convention VI (Status of Merchant Ships at Outbreak of Hostilities), reprinted in Schindler & Toman, *supra* note 13, at 791, was applied, though Serbia and Montenegro were not parties.

131. E.g., Hague IV, Regulations Respecting the Laws and Customs of War on Land: prisoners of war (arts. 4 & 7); the ban on use of poison or denial of quarter (art. 23); or denying protection to a flag of truce (art. 32).

132. See text to note 128 *supra*.

133. Common arts. 1 & 2.

134. THE TIMES (London), June 24, 1997.

135. See, e.g., *Civilian War Claimants' Association v. The King* [1932] A.C. 14.

136. (1951). Reprinted in 46 AM. J. INT'L L. (Supp.) 71 (1952). "Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." *Id.*, art. 14(V)(b) (emphasis added). See also Green, *Making Peace With Japan*, 6 Y.B. WORLD AFF. 176 (1952).

137. As to German trials held in Leipzig after WW I against German accused, these were in accordance with Article 228 of the Treaty of Versailles, the German authorities having declined to hand them over to the Allied Powers in accordance with the Treaty.

138. See, e.g., the German trial of Captain Fryatt (1916) for attempting to ram a German U-boat while captain of a merchant ship. GARNER, 1 INTERNATIONAL LAW AND THE WORLD WAR (1920), and of Nurse Edith Cavell, who, in breach of her protected status as a medical person, assisted in the escape of Allied personnel. Nurse Cavell was not tried for a war crime as such but for a breach of the German Military Penal Code, to which she was not strictly amenable. *Id.* at 97. See also *Llandovery Castle* (1923), in which U-boat officers were tried by a German tribunal for, "contrary to international law," firing upon and killing survivors of an unlawfully torpedoed hospital ship. CAMERON, THE PELEUS TRIAL, app. IX (1948); Trial of Eck (Peleus trial) (1945), *id.*; and the case of *Re Klein* for killing civilian nationals contrary to international law, 1 T.W.C. 46 (1945).

139. See, e.g., *Drierwalde Case*, 1 T.W.C. 81 (1946), for killing captured RAF personnel contrary to art. 23(c).

140. See *Muller's Case* and *Neumann's Case* at Leipzig, H.M.S.O., Cmd. 1422 (1921), at 26, 36, for a finding of guilty of ill-treating prisoners of war contrary to German Penal and Military Penal Codes; see also the U.S. trials of personnel accused of crimes against prisoners or enemy civilians during Korean and Vietnam conflicts, e.g., *U.S. v. Kennan* 14 C.M.R. 742 (1954); *U.S. v. Calley* 46 C.M.R. 19 (1969-1971), 1 M.J. 248 (1973). For instances of trials by German military courts of members of the German armed forces, with executions in some cases for offenses against Allied personnel, both civilian and military, during World War II, see ZAYAS, WEHRMACHT WAR CRIMES BUREAU 1939-1945, 18-22 (1989).

141. (1945). Reprinted in Schindler & Toman, *supra* note 13, at 911.

142. Res. 95 (I), 1946, reprinted in *id.* at 921.

143. *Id.* at 923.

144. See e.g., Green, *Command Responsibility in International Humanitarian Law*, 5 INT'L L. & CONTEMP. PROBS. 319 (1995); Green, *War Crimes: Crimes against Humanity and Command Responsibility*, 50 NAVAL WAR COLL. REV. 26 (1997); Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973); Rosenne, *War Crimes and State Responsibility*, in WAR CRIMES IN INTERNATIONAL LAW 65 (Dinstein & Tabory eds., 1996).

145. During the final session of the Conference, some States, e.g. Canada, made statements indicating that they considered the traditional law denying superior orders as a defense, while accepting it by way of mitigation, to be good law. LEVIE, *PROTECTION OF WAR VICTIMS*, Supp. 40-1 (1985).

146. Protocol I, *supra* note 21, arts. 86 & 87.

147. See, e.g., GREEN, *ESSAYS*, *supra* note 34, ch. 4; Draper, *The Role of Legal Advisers in Armed Services*, 18 INT'L REV. RED CROSS 6 (1978).

148. See, e.g., Buhler Case Polish Supreme National Tribunal 14 T.W.C. 23 (1948). See also *R. v. Finta* 112 D.L.R. (4th) 513 (Sup. Ct. Can.) (1990).

149. See, e.g., Prosecutor v. Dusko Tadić Case No. IT-94-1-T (1997). See also Green, *Drazen Erdemović: The Hague Tribunal in Action*, 10 LEIDEN J. INT'L L. 363 (1997), and Dinstein, *Crimes against Humanity*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY* 891 (Makarczyk ed., 1997).

150. Lists of some of these are to be found in both the British and U.S. manuals, *supra* notes 116 & 117, paras. 110, 111, and 34, 37 respectively.

151. GERMAN WAR BOOK, *supra* note 125, at 66-7.

152. Geneva Conventions, 1949, (I, art. 12; II, art. 12; III, art. 16; IV, art. 13; Protocol I, art. 75) which also forbids any discrimination on grounds of "language, national or social origin, wealth, birth or other status, or any other similar criteria."

153. See, e.g., Green, *The Status of Mercenaries in International Law*, in *ESSAYS*, *supra* note 34, ch. IX, and 8 ISR. Y.B. HUM. RTS. 9 (1978). See also Burmester, *The Recruitment and Use of Mercenaries in Armed Conflicts*, 72 AM. J. INT'L L. 37 (1978).

154. Schindler & Toman, *supra* note 13, at 179, 185. 1996 amendment reprinted in 35 I.L.M. 1206, 1209 (1996). In 1995 a further Protocol was added to the Convention regulating the use of laser weapons. Protocol IV on Blinding Laser Weapons, Oct. 13, 1995, 31 I.L.M. 1218 (1996).

155. Schindler & Toman, *supra* note 13, at 495.

156. *Supra* note 149, Judgment, May 7, 1997.

157. Protocol I, *supra* note 21, at 621.

158. Schindler & Toman, *supra* note 13, at 689.

159. Rwanda, S.C. Res. 955 (Annex), 1994, reprinted in 33 I.L.M. 1598 (1994); Yugoslavia, S.C. Res. 827 (Annex), 1993.

160. See note 149 *supra*.

161. Protocol I, *supra* note 21, art. 56.

162. 35 I.L.M. 809 (1996)

163. *Id.*, paras. 74, 78.

164. In view of the effects of the nuclear weapon, this implies that even tactical weapons used in the field are likely to be considered illegal, as inhumane. In this connection, see *id.*, para. 94.

165. *Id.*, paras. 78, 79.

166. *Id.*, para. 88.

167. *Id.*, para. 95.

168. *Id.*, para. 96.

169. Schindler & Toman, *supra* note 13, at 207.

170. *Id.* See also SPAIGHT, *AIR POWER AND WAR RIGHTS* 42-3 (1947); 2 OPPENHEIM, *INTERNATIONAL LAW* 519 (7th ed., Lauterpacht ed., 1952); 2 SCHWARZENBERGER, *INTERNATIONAL LAW* 153 (1968); 1 LEVIE, *THE CODE OF INTERNATIONAL ARMED CONFLICT* 207-26 (1985).

171. *Shimoda v. Japan*, 8 JAP. ANN. INT'L L. 212, 237-8 (1963); 32 I.L.R. 626, 631 (1966) (emphasis in original).





# VIII

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## The Law of Weaponry at the Start of the New Millennium

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Christopher Greenwood

### I. Introduction

THE LAW OF WEAPONRY, which seeks to regulate both the means and the methods of warfare, is one of the oldest and best established areas of the laws of war.<sup>1</sup> It is also widely regarded as one of the least effective. The remarkable progress which has been made in the development of weaponry and methods of warfare during the twentieth century has been unmatched by development in the law. The result is that much of the law and the legal literature in this field has a distinctly anachronistic feel. For example, the prohibition of weapons causing unnecessary suffering<sup>2</sup> was first established over a century ago but remains part of the law and was recently applied by the International Court of Justice in considering the legality of nuclear weapons.<sup>3</sup> Yet a 1973 survey of the law on weaponry by the United Nations Secretariat cited bayonets or lances with barbs, irregular shaped bullets, and projectiles filled with glass as examples of weapons considered to be outlawed by the unnecessary suffering principle.<sup>4</sup> Scarcely standard weapons at the beginning of the twentieth century, these were museum pieces by its end. Similarly, leading text books refer to the unnecessary suffering principle meaning that “cannons

must not be loaded with chain shot, crossbar shot, red-hot balls, and the like.”<sup>5</sup> Such examples suggest that the law is firmly rooted in the nineteenth century.

Yet it would be wrong to write off the law on weaponry as unimportant in modern warfare. The twentieth century has seen the adoption of prohibitions on two of the century’s most destructive innovations in weaponry—chemical and bacteriological weapons.<sup>6</sup> In the closing years of the century, there has been a burst of activity, unprecedented in this area since the Hague Peace Conferences of 1899 and 1907, which has produced treaties on blinding laser weapons<sup>7</sup> and anti-personnel land mines,<sup>8</sup> as well as a treaty which greatly strengthens the ban on chemical weapons. In addition, the evolution of customary international law regarding the protection of the environment in time of armed conflict has had effects on the law of weaponry, while the discussion of the legality of nuclear weapons by the International Court of Justice, though inconclusive and unsatisfactory in a number of respects, demonstrated that principles established in the last century are capable of being applied well into the next.<sup>9</sup> Finally, wider developments in the laws of armed conflict, in particular the development of the law by the *ad hoc* tribunals for Rwanda and the Former Yugoslavia and the negotiations for the establishment of a permanent international criminal court, have had repercussions for the law on weaponry.<sup>10</sup>

It is therefore a good time at which to take stock of the law relating to weaponry and to consider how that law might develop in the early years of the new millennium. If that is to be done, however, it is important to have a clear understanding of the objectives which the law seeks to achieve in this area and the means by which it has sought, so far, to secure them. Among the reasons why the law on weaponry is so often seen as ineffective are that its objectives are misunderstood and unrealistic expectations are entertained as to what can be achieved. The present paper will accordingly begin with a brief account of the development of the law (Part II) and an analysis of its objectives (Part III). Part IV will then assess the law of weaponry as it stands at the end of the twentieth century. That law does not, however, operate in isolation, and Part V will therefore consider the influence of other parts of international law, in particular those concerned with the restriction of the resort to force, the protection of human rights, and the environment, which may have an impact upon the use of weapons in conflicts. Finally, Part VI will consider how the law is likely to develop in the foreseeable future—and how it might be strengthened.

## II. The Development of the Law Relating to Weaponry

The prohibition of certain weapons, particularly poisonous weapons, can be traced back many centuries. The contemporary law on weapons and the

methods of warfare, however, began to develop only in the mid-nineteenth century. The Lieber Code<sup>11</sup> mentioned the prohibition on the use of poison and, in its emphasis on the principle of necessity, contained an early, albeit implicit, statement of the prohibition of weapons calculated to cause unnecessary suffering.<sup>12</sup> The draft declaration drawn up by the Brussels Conference in 1874<sup>13</sup> and the Oxford Manual prepared by the Institute of International Law in 1880 both contained provisions to the effect that a belligerent State did not possess an unlimited choice of the methods and means of war and prohibited the use of poison, treachery, and weapons causing needless suffering.<sup>14</sup> It is clear, therefore, that by the late nineteenth century there was considerable support for the proposition that international law imposed some constraints upon the weaponry which a belligerent might employ.

The first treaty to that effect was the St. Petersburg Declaration of 1868, which outlawed the employment in hostilities between parties to the Declaration of any "projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances."<sup>15</sup> While the specific prohibition introduced by the Declaration is still in force, a more important feature of the Declaration is the statement in the Preamble of the reasoning behind the specific prohibition, namely:

That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men or render their death inevitable; [and]

That the employment of such arms would, therefore, be contrary to the laws of humanity.

It is this statement which provided the first recognition in treaty form of the prohibition of weapons calculated to cause unnecessary suffering.

The Hague Peace Conferences of 1899 and 1907 built upon these foundations in a number of agreements. Thus, the Regulations on the Laws and Customs of War on Land, adopted at the 1907 Conference,<sup>16</sup> provide that "the right of belligerents to adopt means of injuring the enemy is not unlimited" (Article 22) and go on to declare that it is "especially forbidden" "to employ



arms, projectiles, or material calculated to cause unnecessary suffering" (Article 23(e)). The Peace Conferences also adopted a number of other treaty provisions relating to weaponry and methods of warfare:

- Hague Declaration No. 2, 1899, banning the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases;<sup>17</sup>
- Hague Declaration No. 3, 1899, prohibiting the use of bullets which expand or flatten easily in the body (especially the so-called soft-headed or "dum-dum" bullets);<sup>18</sup>
- Hague Declaration No. 4, 1899, prohibiting for a period of five years the launching of projectiles and explosives from balloons and other methods of a similar nature;<sup>19</sup>
- Hague Regulations, 1907, Article 23(a), prohibiting the use of poison or poisoned weapons;<sup>20</sup>
- Hague Convention No. VIII, 1907, restricting the use of automatic submarine contact mines.<sup>21</sup>

Subsequent years saw the adoption of the 1925 Geneva Chemical and Bacteriological Weapons Protocol, prohibiting the use of asphyxiating, poisonous or other gases, all analogous liquids, materials or devices, and bacteriological methods of warfare.<sup>22</sup> This prohibition on the use of chemical and biological weapons was reinforced many years later by the 1972 Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological and Toxin Weapons, which prohibited the possession of bacteriological and toxin weapons,<sup>23</sup> and the 1993 Chemical Weapons Convention, which prohibited the possession and use as a means of warfare of chemical weapons.<sup>24</sup> Neither the 1949 Geneva Conventions,<sup>25</sup> nor the two Additional Protocols to those Conventions, adopted in 1977,<sup>26</sup> deal with specific weapons. Additional Protocol I does, however, contain a restatement of the principles that belligerents do not have an unlimited right to choose the methods and means of warfare and may not employ methods or means of warfare of a nature to cause unnecessary suffering,<sup>27</sup> and also codifies important principles of customary international law regarding the protection of civilian life and property which have significant consequences for the freedom of States to select the methods and means of warfare.<sup>28</sup> In addition, the Protocol contains some innovative provisions on the protection of the environment in time of armed conflict.<sup>29</sup> The protection of the environment was also addressed in the 1977 United Nations Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques, which prohibited the use of weapons intended to change the environment through the deliberate manipulation of natural processes.<sup>30</sup>

Finally, a United Nations conference held in 1980 adopted the 1981 United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, the three original Protocols to which prohibited the use of weapons which injured with fragments which cannot be detected by x-rays (Protocol I) and imposed certain restrictions on the use of mines and booby traps (Protocol II) and incendiary weapons (Protocol III).<sup>31</sup> A subsequent review conference in 1995-96 adopted an amended Protocol II on mines (which will be superseded for some States by the 1997 Land Mines Convention) and a new Protocol IV on laser weapons.<sup>32</sup>

### **III. The Objectives of the Law Relating to Weaponry**

As the law relating to weaponry is a part of the law of armed conflict, it is therefore to be expected that its objectives reflect those of the law of armed conflict as a whole. The law of armed conflict (or international humanitarian law) is primarily concerned with preserving, as far as possible, certain core humanitarian values during hostilities. It is not designed to prevent or deter States from resorting to force, and the constraints which it imposes must not, therefore, be incompatible with the effective conduct of hostilities. Every State has an undoubted right of self-defense under international law and is entitled to use force in order to vindicate that right.<sup>33</sup> While the law of armed conflict imposes limitations upon what a State may do in the exercise of that right, it is not intended to prevent the effective exercise of the right.<sup>34</sup> The law of armed conflict is thus based upon the assumption that States engaged in an armed conflict will necessarily inflict death and injury upon persons and damage to property, and seeks to limit these effects by preventing the infliction of suffering and damage which is unnecessary because it serves no useful military purpose. The law goes beyond that, however, for it requires that, even where destruction does have a military purpose, a balance be struck between the attainment of that purpose and other values, such as the preservation of civilian life; it prohibits the carrying out of an attack when the military benefit which may be expected to ensue is outweighed by the damage to those values.

The principal objective of the law of weaponry is the protection of these values. Thus, the prohibition of indiscriminate weapons and methods of warfare is designed to serve the objective of distinguishing between civilians and civilian objects, on the one hand, and combatants and military objectives, on the other, and protecting the former. Similarly, the principle that belligerents may not employ weapons or methods of warfare of a nature to cause unnecessary suffering serves the objective of protecting even combatants



from suffering and death which is not necessary for the achievement of legitimate military goals. The principle, which has only recently become a part of the law of weaponry, that limits the use of weapons and methods of warfare which have a substantial adverse effect upon the natural environment<sup>35</sup> also has as its objective the prevention of wanton, unnecessary destruction and the balancing of military needs against the value of environmental preservation.

To that extent, the law of weaponry forms part of an intellectually coherent system. The law has, however, also been used to achieve other objectives which do not so obviously form part of that system. For example, the prohibition of perfidy, which has implications for the choice of methods of warfare (if not the weapons themselves), is designed to serve two very different objectives. In part, it seeks to preserve core humanitarian values by prohibiting the feigning of surrender, protected status, or wounds, because such feints endanger those who genuinely seek to surrender, possess protected status, or are wounded, and whom the law seeks to protect. The prohibition of perfidy has also, however, been used to protect able-bodied combatants from attacks which endanger no one else but which are seen as somehow "unfair." The objective there is the quite distinct one of preserving certain military or chivalric values. Thus, it is easy to see that the prohibition on using the Red Cross and Red Crescent emblems as a shield for military operations<sup>36</sup> serves a humanitarian objective, since abuse of the emblem will endanger genuine medical facilities and personnel. On the other hand, the prohibition on making use of the emblems or uniforms of an adversary while engaging in attacks or in order to assist military operations serves no humanitarian purpose whatsoever; rather, it seeks to ensure that one party to a conflict does not treat the other in a way which is perceived to be contrary to concepts of fair dealing.<sup>37</sup>

In addition, the humanitarian objectives of the law of weaponry have frequently been intertwined with broader concerns about armaments. Thus, the First Hague Peace Conference in 1899 was convened in order to discuss questions of peaceful settlement of disputes, disarmament, and the laws of war, the Russian Government whose initiative had led to the convening of the Conference being particularly concerned to ensure that limits were placed on the introduction of new weapons and the consequent increases in military expenditure which these would entail. In adopting the three declarations banning the use of specific weapons,<sup>38</sup> the Conference clearly had that consideration in mind,<sup>39</sup> but was also influenced by humanitarian considerations. Each of the three Declarations contained a statement to the effect that the Conference had been "inspired by the sentiments" of the 1868 St. Petersburg Declaration, while the debates reveal that humanitarian



considerations were to the fore in the discussions.<sup>40</sup> Similarly, the attempts to rid the world of chemical and biological weapons which have lasted throughout the twentieth century have involved a mixture of humanitarian and disarmament considerations, the 1993 Chemical Weapons Convention being couched very much in the form of a disarmament agreement with its ban on possession as well as use of chemical weapons and its complex verification system.<sup>41</sup>

There is, of course, no reason why humanitarian and disarmament considerations should not be combined. The outlawing of a weapon as cruel and often indiscriminate as poisonous gas serves the values of disarmament and humanity and the employment of disarmament mechanisms for verification makes a ban far more effective than a simple prohibition on use. It should, however, be borne in mind that the objectives are different. Unlike the law of armed conflict, the disarmament process is intended to make war less likely by achieving a reduction in armaments, irrespective of whether the particular weapons involved are more or less cruel or indiscriminate than others which may not be the subject of disarmament negotiations.

Finally, in considering the objectives which the law of weaponry is designed to serve, it is worth remembering that the process by which those objectives have been applied has not always been one of strict rationality. Consideration of whether a particular weapon or method of warfare causes *unnecessary* suffering or *excessive* harm to civilians requires a comparison between different weapons and methods of warfare. Yet the process of comparison has seldom been a scientific—or even a particularly informed—one. Deep-seated taboos found in many societies regarding certain types of injury or means of inflicting harm have meant that certain types of weapon (those employing or causing fire, for example) have been treated as particularly horrific, without any serious attempt being made to compare their effects with those produced by other weapons.

Moreover, a mixture of humanitarian and disarmament considerations has all too often been used to disguise the pursuit of more self-interested objectives. The attempts to ban the crossbow in the twelfth century were the product of concern not only with the injuries which a crossbow could inflict but also with the way in which this infantry weapon changed the balance of power between mounted knights and infantrymen of a far lower social standing.<sup>42</sup> Likewise, the British proposals eight hundred years later to ban the submarine and the naval mine owed more to the threat which those weapons posed to the supremacy of the Royal Navy's surface fleet than their challenge to the humanitarian values underlying the laws of armed conflict. As Captain (later Admiral) Mahan, one of the United States delegates to the 1899 Peace Conference, explained, new weapons have always been denounced as barbaric.<sup>43</sup>

#### IV. The Law of Weaponry at the End of the Twentieth Century

It has already been seen that the law of weaponry consists of general principles, such as that prohibiting weapons of a nature to cause unnecessary suffering, and a number of rules prohibiting, or limiting the use of, specific weapons or methods of warfare. While the relationship between the two is a close one, the specific provisions frequently being an extension of one or other of the general principles, the differences between them are sufficient to justify separate examination here. In particular, the general principles tend to refer to the effects produced by the use of weapons or methods of warfare, whereas the specific provisions usually concentrate upon the means employed. Section 1 of this Part will therefore consider the general principles, while Section 2 will examine some of the rules pertaining to specific weapons. Finally, Section 3 will consider the case of nuclear weapons.

Before turning to the general principles, two preliminary matters call for comment. First, the law of weaponry—both general and specific—has been developed in the context of armed conflicts between States. The treaty provisions have usually been applicable only in conflicts between the parties to the treaty concerned and even the general principles, which apply as part of customary law, have usually been seen as applicable only in international armed conflicts. That assumption is now being challenged. As will be seen, some of the most recent treaties on specific weapons, noticeably the 1993 Chemical Weapons Convention and the two new agreements on land mines (the 1996 Amended Mines Protocol to the Conventional Weapons Convention and the 1997 Land Mines Convention) expressly apply to internal as well as international armed conflicts.<sup>44</sup> In addition, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has held, in its decision in *Prosecutor v. Tadic (Jurisdiction)*, that the customary international law applicable to internal armed conflicts is more extensive than had previously been supposed and, in particular, includes the customary rules regarding methods and means of warfare which apply in international armed conflicts.<sup>45</sup> As the Appeals Chamber put it:

[E]lementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.<sup>46</sup>



This aspect of the decision is controversial, not least because the issue of methods and means of warfare did not, in fact, arise on the facts of the *Tadic* case and there is little evidence of State practice to support the conclusion that the rules of customary international law in internal conflicts are as extensive as the Appeals Chamber found. The argument of logic is, however, compelling, and it is likely that the *Tadic* precedent will be followed on this point, particularly if the International Criminal Court is established and given jurisdiction over war crimes committed in internal conflicts. Nevertheless, some differences remain between the law of weaponry in international conflicts and that applicable in internal conflicts because some of the specific provisions on weaponry have not become customary law and, therefore, depend entirely upon treaties as the basis for their applicability.

Secondly, there have sometimes been differences of opinion over whether weapons and methods of warfare are lawful unless prohibited (either expressly or by necessary implication) or whether one should proceed on the basis that the use of at least certain types of weapon is illegal in the absence of a permissive rule to the contrary. An element of uncertainty on this question can be seen in the Opinion of the International Court of Justice in the *Nuclear Weapons* case. The Court stated both that international law contained no "specific authorization of the threat or use of nuclear weapons"<sup>47</sup> and that it contained no "comprehensive and universal prohibition of the threat or use of nuclear weapons as such."<sup>48</sup> Nevertheless, an examination of the whole Opinion demonstrates that the Court did not endorse the argument that nuclear weapons carried a general stigma of illegality which rendered their use unlawful in the absence of a permissive exception to the general rule. Had the Court adopted such an attitude, its finding that there was no rule authorizing the use of nuclear weapons would have disposed of the case. By holding that international law contained neither a comprehensive prohibition of the use of nuclear weapons, nor a specific authorization of their use, all the Court did was to hold that the answer to the General Assembly's question had to be sought in the application of principles of international law which were not specific to nuclear weapons. When the Court came to consider those principles, it looked to see whether they prohibited the use of nuclear weapons, not whether they authorized such use. In commencing its examination of the law of armed conflict, the Court stated that:

State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition.



The Court must therefore now examine whether there is any prohibition of recourse to nuclear weapons as such ....<sup>49</sup>

This approach, rather than that of seeking a permissive rule, certainly accords better with State practice in relation to all types of weaponry over an extended period.

### *(1) The General Principles of the Law of Weaponry*

(a) *The Unnecessary Suffering Principle.* The most recent statement of this principle can be found in Article 35(2) of Additional Protocol I, which provides that:

It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.

The principle is a long established part of customary international law which can be traced back to the 1868 St. Petersburg Declaration and to the Hague Regulations of 1899 and 1907. As was seen in Part III, the rationale for this principle is to be found in the broader principle of necessity in armed conflict, which prohibits wanton violence that serves no legitimate military purpose.<sup>50</sup> As well as providing a general yardstick against which all weapons and methods of warfare must be judged, the unnecessary suffering principle has provided much of the inspiration for agreements on specific weapons, such as those on explosive, inflammable and soft-headed or expanding bullets,<sup>51</sup> chemical and biological weapons,<sup>52</sup> poison,<sup>53</sup> and weapons which injure with fragments which cannot be detected by x-rays.<sup>54</sup> Some of these agreements go beyond the general principle in that they prohibit the use of such weapons even in circumstances where their use might not have been a violation of the general principle.<sup>55</sup>

The unnecessary suffering principle applies to both the methods and means of warfare. It prohibits outright any weapon (or means of warfare) which is of a nature to cause unnecessary suffering. In addition, where a particular weapon has a legitimate use but is also capable of being used in a way which will, in the circumstances, cause unnecessary suffering (and all weapons can be so used), the principle prohibits the latter use (or method of warfare) even though it does not give rise to an outright ban on the weapon itself.

The fact that a particular weapon or method of warfare causes severe or widespread injuries or death, or inflicts great pain, is not, in itself, sufficient to render its use incompatible with the unnecessary suffering principle. That

principle does not possess an absolute character; it does not prohibit the use of any weapon or method of warfare which causes extreme suffering or extensive injuries, but only those which cause injuries or suffering that are unnecessary. The application of the unnecessary suffering principle thus requires a balancing of the military advantage which may result from the use of a weapon with the degree of injury and suffering which it is likely to cause. As the Japanese court in the case of *Shimoda v. The State* put it, "the use of a certain weapon, great as its inhuman result may be, need not be prohibited by international law if it has a great military effect."<sup>56</sup>

This balancing act is, however, easier to state in the abstract than it is to apply, since one is not comparing like with like and there is considerable uncertainty regarding the factors to be placed on each side of the scales. A 1975 Conference of Experts held at Lucerne which considered this question agreed that the principle "involved some sort of equation between, on the one hand, the degree of injury or suffering inflicted (the humanitarian aspect) and, on the other, the degree of necessity underlying the choice of a particular weapon (the military aspect),"<sup>57</sup> but had more difficulty in agreeing on how this should best be applied. It is important, therefore, to examine the factors which should be taken into account on each side of the equation.

*The Military Aspect.* In determining what factors may be taken into account on the military side of the equation, the Preamble to the St. Petersburg Declaration provides a useful starting point.<sup>58</sup> The Declaration is based upon the premise that, since the legitimate objective of disabling an enemy combatant could be achieved with ordinary rifle ammunition, the "rifle shell" or exploding bullet merely exacerbated injury or rendered death inevitable and should therefore be prohibited. On the other hand, the high explosive shell, which was far more destructive and just as deadly, was excluded from this prohibition because it offered a distinct military advantage in that it could disable several combatants with one shot or destroy large quantities of property, and thus achieve military goals which ordinary rifle ammunition could not. In taking the decision which they did, the States represented at the 1868 Conference rejected two factors which might have been taken into account on the military side of the equation. First, they expressly rejected the argument that since a disabled enemy might recover and be able to fight again, the fact that a weapon made death inevitable was a legitimate military reason for employing that weapon in preference to others. The same reasoning is reflected more than a century later in the ban on weapons which injure with fragments that cannot be detected with x-rays. Secondly, there was an implicit rejection of the argument that the very savagery



of a weapon might be a legitimate military advantage because of the effect which it produced upon the morale of enemy combatants.<sup>59</sup>

As the first modern attempt to apply the unnecessary suffering principle in a specific case, the Declaration remains important. Nevertheless, in at least one respect it presents an over-simplified picture. The suggestion that the legitimate objectives of a belligerent can be achieved by disabling the greatest number of men overlooks the fact that there are other equally legitimate objectives, such as:

[T]he destruction or neutralisation of enemy materiel, restriction of movement, interdiction of lines of communication, weakening of resources and, last but not least, enhancement of the security of friendly forces.<sup>60</sup>

It is generally accepted that the weapons needed to achieve such aims differ, both in character and effect, from those commonly used against personnel and may cause more serious injuries or make death more likely than would typical anti-personnel weapons. Nevertheless, their use does not violate the unnecessary suffering principle, because the advantages which they offer, in terms, for example, of their capacity to destroy materiel, means that this additional suffering cannot be characterized as unnecessary.<sup>61</sup>

*The Humanitarian Aspect.* Disagreement also exists about what factors should be taken into account on the “suffering” side of the equation. The Lucerne Conference considered that

[T]his comprised such factors as mortality rates, the painfulness or severeness of wounds, or the incidence of permanent damage or disfigurement. Some experts considered that not only bodily harm but also psychological damage should be taken into account. Another expert could not accept such a wide interpretation of the concept at issue, as all wartime wounds, no matter how slight, could entail severe psychological harm.<sup>62</sup>

The present writer considers that the concept of “injury” or “suffering” includes the totality of a victim’s injury, and that a distinction between physical and psychological injuries would be artificial, as well as having no basis in past practice concerning weaponry. A more difficult question is whether the effects of the victim’s injuries upon the society from which he or she comes should be taken into account on this side of the equation—for example, the effect upon a society of having to cope with large numbers of limbless or blinded former combatants would invariably be serious and might well be disastrous. Such effects are, however, difficult to quantify and depend more upon the numbers injured than the nature of the injuries in any particular case.



A report published in 1997 by the International Committee of the Red Cross attempts to specify more precise criteria for determining whether a particular weapon causes unnecessary suffering.<sup>63</sup> The approach taken in this Report is to study the medical effects of existing weapons, i.e., the degree to which they cause death or particular types of injury, and suggest four sets of criteria to be used in determining whether a new weapon is one which violates the unnecessary suffering principle.

- Does the weapon foreseeably cause specific disease, specific abnormal physiological state, specific abnormal psychological state, specific and permanent disability, or specific disfigurement?
- Does the weapon foreseeably cause a field mortality of more than 25% or a hospital mortality of more than 5% (figures substantially in excess of those caused by weapons in use at present)?
- Are the weapons designed to cause particularly large wounds?
- Does the weapon foreseeably exert effects for which there is no well recognized and proven treatment?

The identification of these criteria and the medical study on which they are based is of considerable value in helping to show how the balancing act required by the unnecessary suffering principle can be made more precise and less anecdotal than at present. It is, however, important to realize that the fact that a particular weapon meets one of these criteria is not, in itself, sufficient to brand it as unlawful without consideration of the military advantages which that weapon may offer. For example, the fact that soldiers cannot take cover from a particular type of weapon will, as the report points out, heighten the reaction of abhorrence produced by such a weapon.<sup>64</sup> But it is also the very inability of soldiers to take cover that means that the weapon will, in the language of the 1868 Declaration, disable the greatest possible number of enemy combatants, and which thus gives it its military effectiveness when compared with other weapons.

*Comparison Between Weapons.* The essence of the unnecessary suffering principle is that it involves a comparison between different weapons in determining whether the injuries and suffering caused by a particular weapon are necessary. As Dr. Hans Blix has noted, "it is unlawful to use a weapon which causes more suffering or injury than another which offers the same or similar military advantages."<sup>65</sup> The 1868 Declaration was based, as has been seen, on precisely such a comparison. In many cases, however, making that comparison will be more difficult than might appear from a glance at the approach taken in 1868.

It is not enough simply to consider the immediate effects of the two weapons (or methods of warfare) which are being compared. It may well be the case that the one weapon offers the same or similar destructive capability and accuracy as another while causing less horrific injuries or a lower level of fatalities. Before it is concluded, however, that the use of the latter weapon would therefore cause unnecessary suffering, it is necessary to consider a number of other factors, in particular the availability (including the expense) of both types of weapon and the logistics of supplying the weapon and its ammunition at the place where it is to be used. A particularly important consideration will be the extent to which each type of weapon protects the security of the troops which employ it, for if the use of the first, more "humane," weapon will lead to significantly higher casualties amongst the force using it, then there is a valid military reason for using the second. A belligerent is not obliged to sacrifice members of its own armed forces in order to spare the enemy's combatants (as opposed to the enemy's civilian population) the effects of the fighting.<sup>66</sup> These considerations are as much part of the military advantages which the weapon offers as the effects which its use produces on the enemy.

Moreover, it has to be remembered that the degree of choice of weapons decreases as one goes down the chain of command. While those who plan or decide upon operations at the highest levels of command are likely to have a large range of weapons at their disposal and the battle group or task force commander retains a significant element of choice, the individual soldier does not, as Professor Kalshoven puts it, carry the military equivalent of a bag of golf clubs from which he can select the weapon appropriate to each task; usually that soldier has no element of choice of weapon at all.<sup>67</sup> This consideration is likely to be of considerable importance if, which has not hitherto been the case, individual servicemen face trial on charges of using illegal weapons.

*The Effect of the Unnecessary Suffering Principle.* Although it is the oldest principle of the law of weaponry and its continued significance has recently been reaffirmed by the International Court of Justice, in practice the unnecessary suffering principle has only very limited effects. In particular, it is difficult to find a single example of a weapon which has entered into service during the twentieth century and which is generally agreed to fall foul of this principle. There are several reasons why that is the case. First, if the question is whether the weapon itself, as opposed to its use in specific circumstances, contravenes the principle, there is disagreement about the test to be applied. At the Lucerne Conference, a paper submitted by a British military lawyer suggested that the principle would ban a weapon outright only when that weapon was "in practice found inevitably to cause injury or suffering



disproportionate to its military effectiveness.”<sup>68</sup> Other experts contested the use of the word “inevitably” and argued that it was sufficient if the weapon caused such effects in its “normal” use. Article 35(2) of Additional Protocol I speaks of weapons “of a nature” to cause unnecessary suffering. It is doubtful whether the use of this formula offers any greater degree of clarity. In practice, if it can plausibly be argued that there is a significant range of cases in which a weapon can be used without causing unnecessary suffering, the weapon itself is unlikely to be regarded as unlawful under this principle. That conclusion is confirmed by the paucity of examples of contemporary weapons described in the literature as contravening the unnecessary suffering principle.<sup>69</sup> The result is that the unnecessary suffering principle has generally been more important in prohibiting particular uses of weapons (i.e., methods of warfare) than the weapons themselves.

Secondly, as has been seen, the criteria to be employed on both sides of the equation in the unnecessary suffering principle are far from clear. Moreover, even if the criteria themselves were clearer, it is frequently very difficult when a new weapon is developed for anyone outside the circle of those who have been responsible for its development to make an informed assessment of the military advantages which it offers or the medical effects which its use is likely to produce.

Finally, even when sufficient information about the weapon is available, a determination of whether or not its use would violate the unnecessary suffering principle requires a balancing of the likely military advantages and the likely human suffering which its use in the future will entail, and then a comparison between that balance and what would result from the use of alternative weapons. It is scarcely surprising that agreement on the outcome of applying such a test is seldom achieved.

(b) *The Principle of Discrimination.* The second general principle prohibits the use of indiscriminate weapons or—which is more important in practice—the indiscriminate use of any weapon, irrespective of whether that weapon is inherently indiscriminate. This principle is, in fact, a compound of three separate principles. First, it is well established in customary international law that it is unlawful to direct attacks against the civilian population, individual civilians or civilian property. Under the principle of distinction, a belligerent is required to distinguish between the enemy’s combatants and military objectives on the one hand and the civilian population and civilian property on the other, and direct his attacks only against the former.<sup>70</sup> Secondly, even if the target of an attack is a legitimate military objective, the



principle of proportionality provides that it is prohibited to proceed with the attack if it:

[M]ay be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.<sup>71</sup>

Finally, if there is a choice of the methods or means of attack, there is a requirement to take all feasible precautions with a view to avoiding or minimizing incidental civilian casualties and damage.<sup>72</sup>

These principles go primarily to the question of targeting, a matter which falls outside the scope of this paper.<sup>73</sup> Nevertheless, they also have an effect upon the law of weaponry. If a weapon is incapable of being used in a way which permits discrimination between military targets and civilians or civilian objects, then it is inherently indiscriminate and these principles render it unlawful. In practice, very few weapons are so inaccurate that they cannot be used in a way which complies with the principles set out in the preceding paragraph, although the V1 and V2 missiles used by Germany in the Second World War probably fell into that category.<sup>74</sup> A far more common case of conduct prohibited by these principles is the indiscriminate use of a weapon which is capable of being used in a discriminating way. Iraq's use of Scud missiles during the Gulf hostilities in 1991 is an example.<sup>75</sup>

These principles are some of the most important cornerstones of the law of armed conflict. They were so widely disregarded during the Second World War that it was open to question whether they could still be regarded as part of the customary law. Since 1945, however, they have been reaffirmed on a number of occasions, most recently in Additional Protocol I, and were applied by, for example, the Coalition States in the operations against Iraq in 1991.<sup>76</sup> Their status as part of the contemporary customary law cannot now be doubted. While difficulties in their application remain, Protocol I has resolved a great many problems. In particular, it has clarified the principle that attacks must be directed only against military objectives by offering a workable definition of a military objective and has made clear that in applying the test of proportionality, only a "concrete and direct military advantage," rather than a nebulous concept such as the effect on enemy morale, is to be weighed against the effect of an attack upon the civilian population.

The principles contain both absolute and relative elements. The principle of distinction possesses an absolute character—civilians and civilian objects must never knowingly be made the object of attack and care must be taken to ensure that any target is, in fact, a legitimate military objective.<sup>77</sup> The principle of

proportionality, on the other hand, involves a balancing of the military advantages to be gained from an attack upon a military target against expected civilian losses and damage. As with the principle of unnecessary suffering, if those same military advantages can be achieved in different ways, one of which involves likely civilian casualties whereas the other does not, then the choice of the first route will entail a violation of the principle. However, the same qualifications apply here. In determining whether a commander who possesses a choice of weapons or methods of warfare should select one rather than the other, the extent to which both are truly available to him (in the light of such considerations as the likely future calls on precision munitions, the protection of his own forces and the logistic questions considered in the previous section) must be examined. The difference is that, although the security of his own forces remains an important part of this calculation, the need to reduce the risk to the civilian population means that a commander may be required to accept a higher degree of risk to his own forces.

Where the proportionality principle differs from the unnecessary suffering principle is that it is clearly established that it does not stop at the prohibition of unnecessary collateral injury and damage, but also requires a belligerent to abstain from an attack altogether, even if that means losing a military advantage which cannot be obtained by other means, if the military advantage would not be worth the expected civilian casualties and damage. The principle of proportionality is thus a more substantial constraint than the unnecessary suffering principle. Nevertheless, it remains a requirement to balance military gains against civilian losses; it does not possess an absolute character. In this respect, the Commentary on Additional Protocol I published by the International Committee of the Red Cross is misleading when it says that:

The idea has been put forward that even if they are very high, civilian losses and damage may be justified if the military advantage at stake is of great importance. This idea is contrary to the fundamental rules of the Protocol. . . . The Protocol does not provide any justification for attacks which cause extensive civilian losses and damage. Incidental losses and damage should never be extensive.<sup>78</sup>

What the principle of proportionality (as stated in both customary law and the Protocol) prohibits is the causing of *excessive* civilian losses and damage. By substituting the word *extensive*, the Commentary replaces a term which necessarily implies a balance between two competing considerations with a term which suggests an absolute ceiling on civilian losses. There is no basis in the law for such an approach.



The Gulf conflict of 1990-91 demonstrated that the principles which are designed to protect the civilian population are workable. That conflict, however, also highlighted the fact that the proportionality test today requires consideration of a wider range of issues than in the past. In the Gulf conflict, Coalition air raids and naval bombardment of military targets appear to have caused relatively few direct civilian losses, but the damage done to the Iraqi power generating system and other parts of Iraq's infrastructure did far more harm to the civilian population. Application of the proportionality test today, at least at the strategic level, requires that less immediate damage of this kind must also be taken into account, although the difficulty of doing so is apparent.

The treaty statements of the discrimination principles do not apply to naval warfare except in so far as it involves the civilian population on land. Nevertheless, it is clear that there are restrictions on targeting in naval warfare.<sup>79</sup> In particular, merchant ships are not automatically to be treated as legitimate targets unless they engage in certain kinds of behaviour. It has therefore been suggested in a recent study that the principles of distinction and proportionality are applicable, *mutatis mutandis*, as part of the customary law of naval warfare, with consequent implications for the law of weaponry in a naval context.<sup>80</sup>

(c) *The Prohibition of Perfidy*. The principle which prohibits the use of perfidy is well established in both customary international law and Additional Protocol I. The somewhat mixed objectives which this principle seeks to achieve have already been discussed in Part III and little more need be said here. There is probably no weapon which is inherently perfidious,<sup>81</sup> and the principle therefore operates entirely upon the methods of warfare.

The humanitarian rationale of this principle is concisely set out in Article 37(1) of Additional Protocol I as "inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence." The provision then goes on to give the following examples of perfidy:

- (a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
- (b) the feigning of an incapacitation by wounds or sickness;
- (c) the feigning of civilian, non-combatant status; and
- (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.



Article 38 adds a specific prohibition on the improper use of the emblems (principally the Red Cross and Red Crescent) of the Geneva Conventions and internationally recognized protective emblems, such as the flag of truce, as well as any unauthorized use of the United Nations emblem.<sup>82</sup> By contrast, Article 37(2) provides that:

Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.

As has already been seen, these provisions, which reflect customary international law, serve a clear humanitarian objective. The prohibition in Article 39(1) of the use by belligerents of the flags, emblems, and uniforms of neutral States or other States not party to the conflict also serves that objective, since it also seeks to protect persons and objects which would not be legitimate targets of attack. That is not true, however, of the rule in Article 39(2) which forbids the use of *enemy* flags and uniforms by a belligerent while engaging in an attack or in order to shield, favor, protect, or impede military operations. The objective behind the latter rule is quite different and serves no obvious humanitarian purpose.<sup>83</sup>

Traditionally, the law on ruses in naval warfare has been different. In naval warfare, the use of enemy flags and signals is entirely legitimate up to the point at which an attack is commenced.<sup>84</sup> There is, therefore, no equivalent of the rule in Article 39(2) of Additional Protocol I (which is expressly stated not to apply to naval warfare).<sup>85</sup> The principles in Articles 37 and 38 of the Protocol are intended to apply to all forms of warfare, but their application to naval hostilities necessitates some modification to take account of the different conditions of naval warfare. The *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* states the basic principle of perfidy in the same terms used in Additional Protocol I, Article 37(1), and adds, as specific examples of perfidious behavior:

... the launching of an attack while feigning:

- (a) exempt, civilian, neutral or protected United Nations status;
- (b) surrender or distress by, e.g., sending a distress signal or by the crew taking to life rafts.<sup>86</sup>

This provision was supported by a large group of experts and is in accordance with the approach taken in the United States *Naval Commander's Handbook*.<sup>87</sup> It is open to question, however, whether sub-paragraph (a) reflects customary law, since the practice of disguising warships as merchant vessels and the use of Q-ships was extensively practised during the Second World War and there is no clear practice to the contrary since that date.<sup>88</sup>

The *San Remo Manual* also states that:

Ruses of war are permitted. Warships and auxiliary vessels, however, are prohibited from launching an attack whilst flying a false flag, and at all times from actively simulating the status of:

- (a) hospital ships, small coastal rescue craft or medical transports;
- (b) vessels on humanitarian missions;
- (c) passenger vessels carrying civilian passengers;
- (d) vessels protected by the United Nations flag;
- (e) vessels guaranteed safe conduct by prior agreement between the parties, including cartel vessels;
- (f) vessels entitled to be identified by the emblem of the red cross or red crescent; or
- (g) vessels engaged in transporting cultural property under special protection.<sup>89</sup>

(d) *The Principle of Environmental Protection*. A number of specific rules of the law of armed conflict operate, expressly or impliedly, to protect the natural environment. Thus, the 1977 Environmental Modification Treaty addresses the potential problem of a belligerent seeking to use the environment as a means of warfare in itself by prohibiting the use of environmental modification techniques which have widespread, long-lasting, or severe effects upon the environment.<sup>90</sup> This treaty, however, deals with the exceptional case of the deliberate manipulation of the environment for military purposes, rather than the far more common case of environmental damage inflicted in the course of ordinary military operations. To some extent, the prohibition of the wanton destruction of property and the use of chemical and biological weapons, as well as the restrictions on the use of land mines and incendiary weapons indirectly protect the environment. Today, however, it is argued that there is a broader, general principle of respect for the environment in time of armed conflict.<sup>91</sup>

For States party to Additional Protocol I, such a principle is to be found in Article 35(3), which states that:

It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.<sup>92</sup>

This provision was, however, an innovation in 1977 and cannot be regarded as forming part of customary international law.<sup>93</sup>

Nevertheless, there are clear indications that a general principle of environmental respect is emerging and may well already form part of customary law. Thus, the 1995 edition of the U.S. *Commander's Handbook on the Law of Naval Operations* stipulates that:

It is not unlawful to cause collateral damage to the natural environment during an attack upon a legitimate military objective. However, the commander has an affirmative obligation to avoid unnecessary damage to the environment to the extent that it is practicable to do so consistent with mission accomplishment. To that end, and as far as military requirements permit, methods or means of warfare should be employed with due regard to the protection and preservation of the natural environment. Destruction of the natural environment not necessitated by mission accomplishment and carried out wantonly is prohibited. Therefore, a commander should consider the environmental damage which will result from an attack on a legitimate military objective as one of the factors during target analysis.<sup>94</sup>

In its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice stated that:

States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.<sup>95</sup>

The United Nations General Assembly has expressed similar views.<sup>96</sup> While the language may be different in each case, the general sense is substantially the same.<sup>97</sup>

(e) *Other General Principles.* Before leaving the subject of the general principles, it is necessary to consider whether any other general principle may have become part of the law of weaponry. There is, of course, the principle that the right of the parties to an armed conflict to choose the methods and means of warfare is not unlimited.<sup>98</sup> This principle is not, however, a free-standing norm, since it gives no indication what the limitations upon the right to choose



might be. It serves only to introduce the limitations, both general and specific, laid down elsewhere in the law.

A more substantial contender is the Martens Clause, which first appeared in the Preamble to Hague Convention No. II of 1899. The most recent version of this clause appears as Article 1(2) of Additional Protocol I:

In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of the public conscience.

It has sometimes been argued that the use of a particular weapon or method of warfare might be unlawful, as a result of the Martens Clause, even though it was not outlawed by any of the general principles or specific provisions of the law of weaponry.<sup>99</sup> According to this approach, a weapon will be unlawful if its effects are so contrary to considerations of humanity and the public conscience that it arouses widespread revulsion. This view is based upon a misunderstanding of the Martens Clause. There is no doubt that one effect of the Clause is that the absence of a specific treaty provision does not mean that a weapon must be lawful; the Clause makes clear that the general principles embodied in customary law still apply and that the use of a weapon contrary to those principles will be unlawful. Furthermore, the Martens Clause undoubtedly states what has frequently been the motivating force behind the adoption of a specific ban (e.g., those on land mines and laser weapons). There is no evidence, however, that the use of any weapon has ever been treated by the international community as unlawful solely on account of the Martens Clause and the Clause should not be regarded as laying down a separate general principle for judging the legality of weapons under existing law.<sup>100</sup>

Finally, it can reasonably be said that the undoubted duty to respect the territorial integrity of neutral States implies the existence of a general principle that the belligerents must abstain from the use of methods and means of warfare which cause disproportionate damage to the territory of neutral States. This principle has only very limited significance for the use of weapons other than nuclear weapons and it is in that context that it will be considered below.

**(2) Rules on Specific Weapons.** The evolution of the treaty provisions regulating the use of specific weapons has already been outlined in Part II. Unlike the general principles of the law of weaponry, these specific provisions tend to concentrate upon the means used (e.g., exploding bullets of less than 400 grammes weight, laser weapons, chemical weapons), rather than the

effects produced (e.g., unnecessary suffering, disproportionate civilian casualties). They fall into three broad groups:

- Limitations on the use of a particular weapon which fall short of an outright ban;
- Bans on the use, but not the possession and, perhaps, not the retaliatory use, of a particular weapon; and
- Bans on both use and possession.

It is not intended in this paper to try to analyze all of the specific weapons provisions. Instead, three categories of weapons—laser weapons, land mines, and chemical weapons—which have been the subject of important legal changes in the 1990s, and which illustrate the three categories set out above, will be examined.

(a) *The Lasers Protocol*. In October 1995, a Conference was convened under the provisions of Article 8(3) of the 1981 Weapons Convention to review the scope and operation of the Convention and its three Protocols. One of the items on the agenda of the Review Conference was a proposal for the adoption of a new protocol to the Weapons Convention to ban the use of anti-personnel laser weapons (a type of weapon not then in common use but which it was believed would be widely available before long) on the ground that such weapons would cause permanent blindness. This issue had been under consideration by the International Committee of the Red Cross for several years.<sup>101</sup> It had been argued by some commentators that the use of laser weapons to blind enemy combatants was already prohibited by the unnecessary suffering principle.<sup>102</sup> That conclusion was challenged, however, by others who argued that a blinding weapon could not be regarded as causing *unnecessary* suffering when the alternative weapons could cause death.<sup>103</sup> In fact, the arguments are finely balanced and the unnecessary suffering principle probably does not outlaw the use of anti-personnel lasers as such, although it might prohibit their use in certain circumstances.<sup>104</sup> In view of this difference of opinion and the uncertainty inherent in the application of the unnecessary suffering principle, the opponents of anti-personnel lasers not surprisingly decided that it was necessary to seek a specific ban.

In this case, the approach of seeking to eliminate an entire category of weapons was never an option. Lasers are used on the battlefield for a wide range of undoubtedly legitimate purposes, including target identification and range finding, which would not normally involve injury to eyesight and which States were not willing to abandon. In addition, several States distinguished between the use of lasers against the human eye and their use against equipment optical systems, where there was a risk of incidental injury to the human eye.



The new agreement,<sup>105</sup> adopted by the Review Conference as Protocol IV to the Weapons Convention, reflects these views. Article 1 prohibits the employment of “laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices.” The use of laser weapons which do not have as one of their combat functions the causing of permanent blindness to the naked eye is not, therefore, prohibited and, if blindness is caused as a collateral consequence of the use of such a weapon, or the use of other laser systems such as range finders, there will be no violation of the Protocol.<sup>106</sup> Article 2 of the Protocol, however, requires the parties to take all feasible precautions, when using laser systems not prohibited by the Protocol, to avoid causing blindness to the unenhanced vision of enemy combatants.

The result is a treaty that bans the use of a fairly narrow category of weapons—laser weapons specifically designed to cause blindness. The use of other types of laser weapon, even if it results in blindness, remains lawful. At the time of writing, the Protocol had not yet entered into force. When it does, it will be binding only upon those States parties to the Weapons Convention which opt to become bound by Protocol IV.

(b) *Land Mines*. Unlike laser weapons, land mines have been the subject of a sustained campaign during the 1990s to achieve a total ban. Whereas the concern about blinding laser weapons centered on the unnecessary suffering principle, the move to ban land mines was motivated more by the effects which their use had been shown to have upon the civilian population, often long after the conflict. Nevertheless, while the indiscriminate use of land mines was a violation of the general principle of distinction, they were also capable of lawful use, against military targets or as a means of denying an adversary access to an area of land.

Protocol II to the Weapons Convention already contained limitations on the use of land mines and booby-traps.<sup>107</sup> So far as mines<sup>108</sup> were concerned, the original Protocol II limited their use in the following ways:

- By prohibiting their use against civilians and their indiscriminate use (Article 3), although this added nothing to the general principles on targeting;
- By imposing a more specific restriction on the use of mines in centers of civilian population where combat was not actually taking place (Article 4);
- By prohibiting the use of remotely delivered mines unless they are used within an area which is itself a military objective and either their location is accurately recorded or they are fitted with a self-neutralizing mechanism which



will render the mine harmless or destroy it when it no longer serves the military purpose for which it was laid (Article 5); and

- By requiring the recording and publication of the location of minefields and co-operation in their removal after a conflict (Articles 7 and 9).

The provisions of the Protocol are very limited. Only Article 5 imposed a substantial limitation and this is “clumsily worded.”<sup>109</sup> Not surprisingly, these provisions were widely regarded as insufficient in view of the devastating effects of land mines—often continuing for many years after the end of active hostilities.<sup>110</sup> A number of States therefore pressed for a complete ban on land mines, while others urged the Review Conference to tighten the restrictions in Protocol II.

The first result was the adoption in 1996 of an amended Protocol II<sup>111</sup> which goes some way towards tightening the restrictions on the use of land mines and increasing the protection of the civilian population. The most important changes introduced by the amendments are as follows:

- A ban on the use of various devices which make mine clearance more dangerous (Article 3(5) and (6));
- A ban on the use of anti-personnel mines which are not detectable, as specified in the technical annex to the Protocol (Article 4);
- Restrictions on the use of mines which do not meet the requirements in the technical annex (Article 5). The technical annex requires that mines produced after 1 January 1997 must meet certain requirements regarding detection and self-neutralization and their location must be carefully recorded;
- Stricter constraints on the use of remotely delivered mines (Article 6);
- Stricter rules for the protection of peacekeepers and others not directly involved in the conflict (Article 12) and for the protection of civilians (Article 3(8) to (11));
- A more extensive obligation regarding mine clearance after the conflict (Articles 10 and 11); and
- A prohibition on the transfer of mines which do not meet the requirements of the Protocol and limitations on the transfer of mines which do meet those requirements (Article 8).

The amended Protocol II is thus considerably more stringent than the original Protocol. Whether it will succeed in significantly reducing the threat posed to civilians by mines is another matter. One of the biggest threats to civilians is the large numbers of old mines, readily available and cheap, which do not meet the requirements of the amended Protocol and which are likely to be used by untrained personnel. This risk is particularly acute in civil wars; indeed, it is in the civil wars in Angola and Cambodia that some of the worst casualties from

land mines have been sustained. It is therefore an important development that the amended Protocol is expressly applied to internal armed conflicts within the meaning of common Article 3 of the Geneva Conventions, where it applies both to the government and rebel parties.<sup>112</sup> Since the other Protocols to the Weapons Convention contain no provision on the scope of their application, they apply only in the circumstances specified in Article 1 of the Weapons Convention itself, namely international armed conflicts, including wars of "national liberation" as defined in Article 1(4) of Additional Protocol I to the Geneva Conventions. It has, however, been suggested, notwithstanding the absence of any express provision regarding internal conflicts in the new Protocol IV, that Protocol was also intended to apply to internal armed conflicts,<sup>113</sup> although no trace of such an understanding is to be found in its text.

The amended Protocol II did not go far enough for a large body of States. They aimed instead at a complete ban on the use and transfer of land mines and, to that end, adopted a separate treaty in 1997. The United Nations Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, as its name suggests, is a complete ban on the use of anti-personnel land mines.<sup>114</sup> The Convention, the Preamble of which echoes the language of the Martens Clause and refers specifically to both the unnecessary suffering principle and the principle of distinction, goes beyond a ban on the use of anti-personnel mines "in all circumstances" and bans their production, stockpiling, and possession, as well as the transfer of such mines to others. The definition of an anti-personnel mine, however, excludes mines "designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person," even if equipped with anti-handling devices.<sup>115</sup> The Convention requires that all parties take steps, including the imposition of penal sanctions, to ensure implementation of its provisions.<sup>116</sup> While the conclusion of this Convention was a triumph for the opponents of land mines, its effectiveness is likely to be limited as a number of major military powers have declined to participate.

Once the 1997 Convention and the amended Protocol II enter into force, there will be a complex network of obligations regarding land mines:

- States party to the 1997 Convention will be obliged not to employ anti-personnel land mines in any circumstances, even in hostilities with States not party to the Convention;
- States party to the 1980 Conventional Weapons Convention which elect to become party to the amended Protocol II will be bound by that Protocol in their relations with other States party to the 1980 Convention which have accepted that Protocol;



- States party to the 1980 Conventional Weapons Convention which elect not to become party to the amended Protocol II will remain bound by the original Protocol II in their relations with other parties which have made the same choice; and

- States not party to the 1980 Convention or which have not accepted either version of Protocol II will remain subject in their use of land mines only to the customary law general principles on unnecessary suffering and distinction and other States will be subject to the same regime in their relations with such States (unless, of course, they are parties to the 1997 Convention). As students of the law will doubtless testify, multiplicity of law making bodies has its price.

(c) *Chemical Weapons*. By far the most important development in the law of weaponry during the last decade of the twentieth century has been the adoption in 1993 of a new Chemical Weapons Convention.<sup>117</sup> The use of chemical weapons in warfare had already been prohibited by the 1925 Geneva Protocol.<sup>118</sup> That prohibition, however, was incomplete in a number of respects. In particular, so many States had entered reservations to the 1925 Protocol, to the effect that they retained the right to use chemical weapons if those weapons were first used against themselves or their allies, that the Protocol was, in reality, only a ban on the first use of such weapons.<sup>119</sup> The use of chemical weapons by Iraq, first against Iranian armed forces and later against parts of Iraq's own civilian population, during the Iran-Iraq war,<sup>120</sup> and the threats by Iraq to use chemical weapons during the Kuwait conflict,<sup>121</sup> highlighted the weakness of the existing legal regime. The prohibition on the use of chemical weapons was reaffirmed by a declaration adopted by 149 States at the Paris Conference in January 1989. Subsequent negotiations led to the adoption of the new convention in 1993. The Convention entered into force in April 1997.

The 1993 Convention establishes a legal regime far more extensive than that contained in the 1925 Protocol and customary international law. While space does not permit a detailed analysis of the provisions of the 1993 Convention here,<sup>122</sup> three points call for comment. First, the scope of the 1993 Convention is broader than that of the 1925 Protocol. The range of weapons covered by the 1925 Protocol had long been the subject of debate, with the United States, and latterly the United Kingdom, arguing that non-lethal riot control agents lay outside the scope of the Protocol,<sup>123</sup> an interpretation contested by many other States. The new Convention expressly prohibits the use of riot control agents "as a method of warfare."<sup>124</sup> While this prohibition still leaves some room for debate about whether a particular use of riot control agents (for example, to suppress a riot at a prisoner of war camp or to deal with



demonstrators in occupied territory) constitutes their use "as a method of warfare," it clearly outlaws the use of riot control agents against enemy forces in combat or in bombardment of enemy targets. In addition, the obligation placed upon States parties by Article I, paragraph 1, never to use chemical weapons "under any circumstances" applies to non-international armed conflicts, as well as to conflicts between States.<sup>125</sup> While it had been argued by some States and commentators that the prohibition in the 1925 Protocol was also applicable to non-international conflicts,<sup>126</sup> the matter was not free from doubt and the greater clarity of the new Convention is thus most welcome.

Secondly, the 1993 Convention prohibits *all* use of chemical weapons in warfare, not just their *first* use. The obligation never to use chemical weapons in any circumstances, contained in Article I, was intended to exclude the operation of the doctrine of belligerent reprisals as a justification for employing chemical weapons. In addition, Article XXII provides that the Convention is not subject to reservations, so that there is no scope for States to become parties subject to the kind of reservations which many entered on becoming parties to the 1925 Protocol. That does not mean that a State which was the victim of a chemical attack in violation of the Convention may not retaliate. The Convention prohibits retaliation in kind, in the form of a chemical counter-attack, but it does not affect the right of States to retaliate by other means. In this context, a particularly important question is whether a State could lawfully resort to the use of a nuclear weapon in response to a chemical attack. This possibility was considered at some length by Judge Schwebel in his dissenting opinion in the *Nuclear Weapons* case, where he discussed the threat of nuclear retaliation allegedly made by the United States to dissuade Iraq from resorting to chemical weapons during the Kuwait conflict.<sup>127</sup> In the writer's view, the Court's advisory opinion in the *Nuclear Weapons* case leaves open the question whether such a reprisal would be lawful.

Finally, the 1993 Convention goes far beyond a prohibition on the use of chemical weapons and outlaws their manufacture, acquisition, stockpiling, and transfer.<sup>128</sup> It also requires States to destroy their existing stocks.<sup>129</sup> The Convention creates a complex regime of inspection and verification, which goes beyond that envisaged by the Land Mines Convention, the object of which is to guarantee that chemical weapons are completely eliminated. This ambitious project takes the Convention out of the scope of the law of armed conflict and into the realm of arms control. It remains to be seen whether some of the doubts expressed about the effectiveness of this regime can be overcome and the goal of the Convention attained.

(3) *Nuclear Weapons*.<sup>130</sup> Nuclear weapons merit separate consideration, both because of their inherent importance and because of the intensity of the debate about whether their use could ever be compatible with the law of weaponry. Those who argue that it could not have tended to base their case on one or more of three propositions.

- That there exists in international law a specific prohibition of the use of nuclear weapons. Since there is evidently no treaty of general application containing such a prohibition, this argument is based upon a series of resolutions adopted by the United Nations General Assembly over the years;<sup>131</sup>

- That one of the other specific prohibitions applies directly, or by analogy, to nuclear weapons. The prohibitions on which reliance is usually placed being those on chemical weapons and poisoned weapons; and

- That any use of nuclear weapons would inevitably violate one or more of the general principles of the law of weaponry.

These arguments have been fully canvassed both in the literature<sup>132</sup> and in the submissions of certain States to the International Court of Justice in the proceedings on the request for an *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*.<sup>133</sup>

Those who take a contrary view do not, for the most part, deny that the law of weaponry is applicable to nuclear weapons. Indeed, it is striking that none of the nuclear-weapon-States which made submissions to the International Court of Justice took such a position.<sup>134</sup> The only respect in which the law of weaponry does not apply to nuclear weapons is that the innovative provisions introduced by Additional Protocol I were adopted on the understanding that they would not apply to the use of nuclear weapons.<sup>135</sup> They maintain, however, that there is no specific prohibition of the use of nuclear weapons in international law, that the prohibitions on chemical weapons and poison do not extend to nuclear weapons, and that it is possible to envisage circumstances in which nuclear weapons could be used without violating the general principles.

In some respects, the Court's Advisory Opinion has clarified the issues in this debate.<sup>136</sup> The Court found (by eleven votes to three) that there was no specific prohibition of nuclear weapons, the majority taking the view that the General Assembly resolutions were insufficient to create a rule of customary international law in view of the strong opposition and contrary practice of a significant number of States.<sup>137</sup> The Court also rejected the argument that nuclear weapons were covered by the prohibitions on chemical weapons or poisoned weapons. The Court found that the various treaties on chemical and biological weapons had "each been adopted in its own context and for its own



reasons” and concluded that the prohibition of other weapons of mass destruction did not imply the prohibition of nuclear weapons, while the ban on poisoned weapons had never been understood by States to apply to nuclear weapons.<sup>138</sup>

Given the Court’s conclusions on these points (which, it is submitted, are manifestly correct), the Court necessarily concentrated on the application to nuclear weapons of the general principles. The Court referred, in particular, to the prohibition of weapons calculated to cause unnecessary suffering, the prohibition of attacks upon civilians and of the use of indiscriminate methods and means of warfare, and the principle protecting neutral States from incursions onto their territory. Although the Court noted that the use of nuclear weapons was “scarcely reconcilable” with respect for these principles, it concluded that it did not have:

[S]ufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.<sup>139</sup>

This passage suggests that the Court should therefore have concluded that the use of nuclear weapons was not unlawful in all circumstances. In fact, however, it adopted, by seven votes to seven on the casting vote of the President, the following conclusion:

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.<sup>140</sup>

The Opinion is not easy to follow at this point. In the absence of a specific prohibition of the use of nuclear weapons, the only basis upon which the Court could have concluded, consistently with its own earlier reasoning, that such use was illegal in all circumstances would have been by analyzing the circumstances in which nuclear weapons might be used and then applying the principles of humanitarian law which were relevant. At the heart of any such analysis would have been three questions.



- Would the use of a nuclear weapon in the particular circumstances inflict *unnecessary* suffering upon combatants?
- Would the use of a nuclear weapon in the particular circumstances be directed against civilians or indiscriminate, or, even if directed against a military target, be likely to cause *disproportionate* civilian casualties ?
- Would the use of a nuclear weapon in the particular circumstances be likely to cause *disproportionate* harmful effects to a neutral State ?

To answer those questions would have required both a factual appreciation of the capabilities of the weapon being used and the circumstances of its use and a value judgement about whether the adverse consequences of that use were “unnecessary” or “disproportionate” when balanced against the military goals which the State using the nuclear weapon was seeking to achieve.

The Court did not, however, attempt that task but merely enumerated the relevant principles, with little discussion, before reaching the conclusions quoted above.<sup>141</sup> It is not clear, therefore, how it arrived at its conclusion that the use of nuclear weapons would “*generally* be contrary to the rules of international law applicable in armed conflict,” nor, indeed, what it meant by the term “generally” in this context. It is clear, both from the voting on paragraph 2E of the *dispositif* and from some of the separate and dissenting opinions, that there was a considerable divergence of views within the Court.

Nevertheless, if one looks at the Opinion as a whole, the only interpretation of the first part of paragraph 2E which can be reconciled with the reasoning of the Court is that, even without the qualification in the second part of the paragraph, the Court was not saying that the use of nuclear weapons would be contrary to the law of armed conflict in all cases. It could only have reached such a conclusion if it had found that there were no circumstances in which nuclear weapons could be used without causing unnecessary suffering, striking civilians and military targets indiscriminately (or with excessive civilian casualties), or causing disproportionate damage to neutral States. The Court did not make such an analysis, and the reasoning gives no hint that it reached such a conclusion. Indeed, it is difficult to see how it could have done so. In considering the application of principles of such generality to the use of weapons in an indefinite variety of circumstances, the Court could not have determined that as a matter of *law* a nuclear weapon could not be used without violating one or more of those principles,<sup>142</sup> even if some of its members suspected as a matter of *fact* that that was so.

This reading of the Opinion is reinforced by the fact that there is only one other basis upon which the second part of paragraph 2E of the *dispositif* could make sense. That is that, although the use of nuclear weapons would always be

contrary to the law of armed conflict, the Court was not prepared to exclude the possibility that there might be circumstances in which the right of a State to self-defense could override the prohibition imposed by the law of armed conflict. Although that interpretation has received a measure of support,<sup>143</sup> it flies in the face of the long established principle that the law of armed conflict applies equally to both sides in a conflict. To hold that the party exercising the right of self-defense can depart from fundamental principles of the law of armed conflict would drive a coach and horses through that principle.<sup>144</sup>

The Court's Opinion has attracted an enormous amount of interest among academic commentators. It is a mark of the ambiguity of the Opinion in general and of paragraph 2E in particular, that some commentators have seen it as largely vindicating the position of the nuclear-weapons States, while others have claimed it as a victory for the anti-nuclear lobby.<sup>145</sup> The present writer finds the analysis of the first group the more persuasive.

## V. The Applicability to Weaponry of Other Rules of International Law

It is tempting to take the view that once States resort to the use of force, the law of armed conflict, as *lex specialis*, takes over from all other parts of international law. On this view, the use of methods and means of warfare is governed exclusively by the law of weaponry. In practice, however, that law does not operate in isolation and the rest of international law cannot be disregarded in determining whether the use of a particular weapon is lawful. Three other areas of international law, all of which were considered by the International Court of Justice in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, are potentially relevant.

First, it has sometimes been suggested that the use of particular weapons, especially nuclear weapons, would violate the right to life under human rights treaties.<sup>146</sup> The United Nations Human Rights Committee, for example, has commented that "the designing, testing, manufacture, possession and deployment of nuclear weapons are amongst the greatest threats to the right to life which confront mankind today."<sup>147</sup> However, warfare invariably involves the taking of life and it is clear that the human rights treaties were not intended to outlaw all military action even in self-defense. By prohibiting the *arbitrary* taking of life, Article 6 of the 1966 International Covenant on Civil and Political Rights, and the comparable provisions in other human rights treaties, imply that not all taking of life is prohibited. The *travaux préparatoires* of Article 6 make clear that, in the context of warfare, the term "arbitrary" was intended to mean the taking of life in circumstances which



were contrary to the law of armed conflict, and killing in the course of a “lawful act of war” was expressly given as an example of a taking of life that would not be arbitrary.<sup>148</sup>

This was the view taken by the International Court of Justice in the *Nuclear Weapons* case. The Court accepted that the protection of the International Covenant (and, by implication, other human rights treaties) did not cease in time of armed conflict but held that:

The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict, which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.<sup>149</sup>

This conclusion, though no doubt unwelcome to some human rights lawyers, is plainly correct in view both of State practice and the *travaux préparatoires* of the Covenant. Nevertheless, the Court’s acceptance that human rights treaties continue to apply in time of war (except insofar as derogation is expressly permitted) may be of considerable importance in other cases. Although the right to life may add nothing to international humanitarian law at the substantive level, human rights treaties contain unique mechanisms for enforcement which may be of great assistance to individuals seeking to rely upon the right to life in order to show that there has been a violation of the law of armed conflict.<sup>150</sup>

Secondly, it has been suggested, again primarily in relation to nuclear weapons, that international environmental law is applicable to the use of weapons.<sup>151</sup> In the *Nuclear Weapons* case, the Court stated that “the issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.”<sup>152</sup> It rejected the argument that the use of nuclear weapons was prohibited as such by the general environmental treaties or by customary environmental law.<sup>153</sup> It would have been extraordinary for the Court to have concluded that nuclear weapon States, which had so carefully ensured that treaties on weaponry and the law of armed conflict did not outlaw the use of nuclear weapons, had relinquished any possibility of their use by becoming parties to more general environmental agreements. Nevertheless, the Court indicated that the international law on the environment does not



altogether cease to apply once an armed conflict breaks out, and it seems that it found the origins of what it identified as a customary law duty of regard for the environment in times of war<sup>154</sup> as much in the general law on the environment as in the specific provisions of the law of armed conflict.

Finally, the *Nuclear Weapons* case confirms that:

A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4 of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful.<sup>155</sup>

This proposition was not contested by any of the States which submitted arguments to the Court.

The Court held that the right of self-defense under Article 51 of the Charter was subject to the limitations of proportionality and necessity which it had earlier held, in the *Nicaragua* case,<sup>156</sup> were part of the right of self-defense at customary international law.<sup>157</sup> It also concluded that, although neither Article 2(4) nor Article 51 refers to specific weapons, the need to ensure that a use of force in self-defense was proportionate had implications for the degree of force and, consequently, for the weaponry which a State might lawfully use. The proportionality requirement of self-defense thus had an effect upon the legality of the way in which a State conducted hostilities. In determining whether the use of a particular weapon in a given case was lawful, it was therefore necessary to look at both international humanitarian law and the requirements of the right of self-defense.

The Court's opinion on this point is of considerable importance. The logic of the Charter and customary law provisions on self-defense means that the modern *jus ad bellum* cannot be regarded as literally a "law on going to war," the importance of which fades into the background once the fighting has started and the *jus in bello* comes into operation.<sup>158</sup> The *jus ad bellum* imposes an additional level of constraint upon a State's conduct of hostilities, affecting, for example, its choice of weapons and targets and the area of conflict. The Court did not, however, accept, as some commentators had argued, that the use of nuclear weapons could never be a proportionate measure of self-defense.<sup>159</sup> In reaching this conclusion, it appears to have accepted that proportionality has to be assessed, as Judge Higgins put it, by considering "what is proportionate to repelling the attack" and not treated as "a requirement of symmetry between the mode of the initial attack and the mode of response."<sup>160</sup>

It is evident, therefore, that the legality of the methods and means of warfare can no longer be considered by reference to the law of weaponry alone.

Especially when one considers the more destructive weapons, the law of the United Nations Charter will be a significant factor to be borne in mind. Human rights law and international environmental law may also have some importance, although their application is likely to have only a small impact on the substantive law applicable to the use of particular weapons.

## VI. The Future of the Law of Weaponry

This stocktaking of the law of weaponry at the end of the twentieth century shows that this part of the law of armed conflict, while not one of the most effective, cannot be disregarded as an anachronism. The adoption of new treaties on weapons of real military significance, such as chemical weapons and land mines, demonstrates that it is possible to develop legal regimes which, if they are made to function properly, can have a significant impact in protecting the values of humanitarian law. Similarly, the Advisory Opinion on *Nuclear Weapons*, whatever its shortcomings, shows that the general principles of the law are capable of developing in such a way that they can be applied to new types of weapon. How then is the law likely to evolve as we enter the new millennium?

The outline of two developments is already visible. First, the trend of extending the law of weaponry from international armed conflicts to conflicts within States is likely to prove irreversible. Application to such conflicts has already been the subject of express provision in the two latest agreements on land mines and the Chemical Weapons Convention. In addition, the logic of the position taken by the International Criminal Tribunal for the Former Yugoslavia in the *Tadic* case and the general trend towards the development of the law of internal conflicts means that most, if not all, of the law of weaponry is likely to become applicable in internal conflicts in time. There is every reason why this should be so. While arguments against extending parts of the law of international armed conflicts, such as those which create the special status of prisoners of war, to internal hostilities have some force, there is no compelling argument for accepting that a government may use weapons against its own citizens which it is forbidden to use against an international adversary, even in an extreme case of national self-defense.

Secondly, it seems probable that the concept of penal sanctions for those who violate the law of weaponry will become far more important in the future. The Chemical Weapons Convention and the 1997 Land Mines Convention both make express provision for the enactment of criminal sanctions.<sup>161</sup> Certain violations of the principle of distinction are included in the grave



breaches regime by Additional Protocol I, Article 85. Moreover, any serious violation of the laws of war is already a war crime and this would include a serious violation of one of the weaponry treaties or a general principle such as that prohibiting unnecessary suffering. However, the existence of the two *ad hoc* criminal tribunals and the development of their jurisprudence, together with the likelihood of a future permanent international criminal court with an extensive war crimes jurisdiction, means that these sanctions are likely to be far more significant in the future. How far this is a desirable development is another matter. While the present writer strongly supports the principle of effective criminal sanctions for violations of the law of armed conflict, it has been seen that the general principles of the law of weaponry—and, indeed, some of the specific provisions—are far from clear or easy to apply. It would be quite wrong to hold individual servicemen, especially low down the chain of command, criminally responsible for the good faith use of weapons with which their government has provided them. Moreover, the preparatory talks on the international criminal court have shown a disturbing tendency to try to use the negotiation of the Court's statute as a way of revising the substantive law on weaponry, thus risking upsetting the work of more specialized conferences.

It is less easy to speculate as to what weapons might be made the subject of new agreements for the prohibition or limitation of their use. Incendiary weapons, fuel-air explosives, and napalm have all attracted considerable opprobrium over the last part of the twentieth century and are likely to face further calls for their limitation or outright prohibition. The precedent of the campaign against land mines, which attracted far greater publicity than do most developments in the law of armed conflict, suggests that future calls for changes in the law of weaponry may come as much from NGOs and public opinion as from governments. Such a change is both desirable and in keeping with the spirit of the Martens Clause. It carries the danger, however, that some of these calls will be unrealistic both in failing to recognize that States must be able to defend themselves and in the expectations which they create about what can be achieved.

One of the most important issues is likely to be the future of nuclear weapons. The inconclusive Opinion of the International Court of Justice included a unanimous finding that:

There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.<sup>162</sup>



Although this paragraph adds little of substance to the Non-Proliferation Treaty, it has already led to calls for fresh negotiations on nuclear disarmament. In this writer's view, attempts to achieve a ban on the use of nuclear weapons are unlikely to succeed in the foreseeable future and would probably prove counter-productive in that they will block progress in other areas (as happened with attempts to reform the law of armed conflict in the 1950's). As far as the possession of nuclear weapons is concerned, a ban is likely to prove possible only if all the nuclear-weapons States (declared and undeclared) support it, and such a result could not be achieved without simultaneous progress on a range of related security issues.

One of the most important developments may well prove to be the application to new types of weaponry of the existing general principles. The Advisory Opinion in the *Nuclear Weapons* case has demonstrated that these principles are capable of being applied to weapons of a kind which was beyond contemplation when those principles were first developed. The flexibility of the general principles thus makes them of broader application than the specific provisions which are all too easily overtaken by new technology. If the speed of change in military technology continues into the next century (as seems almost inevitable),<sup>163</sup> that capacity to adapt is going to be ever more important.

Take one example. Suppose that it became possible for a State to cause havoc to an enemy through the application of electronic measures or the selective planting of computer viruses which brought to a standstill whole computer systems and the infrastructure which depended upon them. Such a method of warfare would appear to be wholly outside the scope of the existing law. Yet that is not really so. The application of those measures, though not necessarily an "attack" within the meaning of Additional Protocol I because no violence need be involved,<sup>164</sup> is still likely to affect the civilian population and possibly to cause great damage and even loss of life amongst that population. As such, it should be subject to the same principles of distinction and proportionality considered above.

The application of the general principles of such forms of warfare would, however, require a measure of refinement of those principles. The place in the concept of proportionality which should be given to indirect, less immediate harm to the civilian population would have to be resolved. Similarly, if the principle of distinction is to be applied to existing, let alone new, weapons of naval warfare, a clearer assessment needs to be made of exactly what constitutes a legitimate target in naval hostilities. Both the military and humanitarian aspects of the unnecessary suffering principle need to be clarified if that principle is to have a significant impact in the assessment of new

methods and means of warfare. The duty which States have to scrutinize developments in weaponry and to assess whether any new weapons or methods of warfare comply with the law<sup>165</sup> means that the resolution of such questions is a matter of considerable importance.

In this writer's opinion, it is both more probable and more desirable that the law will develop in this evolutionary way than by any radical change. With the law of weaponry, as with most of the law of armed conflict, the most important humanitarian gain would come not from the adoption of new law but the effective implementation of the law that we have. That should be the priority for the next century.

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### Notes

1. For example, the Second Lateran Council in 1139 attempted to ban the crossbow. Prohibitions of particular weapons or methods of warfare are to be found in several different traditions. See UNESCO, *INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW* (1988), and Waldemar A. Solf, *Weapons*, in 4 RUDOLF BERNHARDT ET AL., *ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW* 352 (1982). The more recent history of this area of the law is discussed in Frits Kalshoven, *Arms, Armaments and International Law*, 191 *RECUEIL DES COURS* 185–341 (1985–II). Strictly speaking, the “means of warfare” refers to the weapons themselves, whereas the “methods of warfare” refers to the ways in which those weapons are used. The term “the law of weaponry” is here used to describe the legal rules and principles relating to methods and means of warfare.

2. This principle is discussed in Part IV, *infra*.

3. *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion of July 8, 1996), 1996 I.C.J. 226.

4. *Respect For Human Rights in Armed Conflicts: Existing Rules of International Law Concerning the Prohibition or Restriction of Use of Specific Weapons*, U.N. Doc. A/9215, vol. I, at 204 (1973). The list was based upon the entries in national manuals of military law. See, e.g., UNITED KINGDOM WAR OFFICE, *THE LAW OF WAR ON LAND* (Part III of the Manual of Military Law) 110 (1958).

5. SIR HERSCH LAUTERPACHT, *OPPENHEIM'S INTERNATIONAL LAW* 340–1 (7th ed. 1952).

6. Geneva Protocol Prohibiting the Use in War of Asphyxiating, Poisonous or other Gases and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571 (1975), 94 L.N.T.S. 65 [hereinafter Geneva Gas Protocol]; Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction, April 10, 1972, 26 U.S.T. 583 (1975), 1015 U.N.T.S. 164 [hereinafter Bacteriological and Toxin Weapons Convention]; Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, 32 I.L.M. 800 (1993) [hereinafter Chemical Weapons Convention].

7. Additional Protocol No. IV on Blinding Laser Weapons, Oct. 13, 1995 [hereinafter Lasers Protocol] to the Convention on Prohibitions or Restrictions on Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects,



35 I.L.M. 1218 (1996) [hereinafter Conventional Weapons Convention]. The Convention itself is at 19 I.L.M. 1523 (1980).

8. Additional Protocol II on Mines, Booby-Traps and Other Devices to the Conventional Weapons Convention, 1980, 19 I.L.M. 1523 (1980) [hereinafter Original Mines Protocol], Amended Additional Protocol II, May 3, 1996, 35 I.L.M. 1206 (1996) [hereinafter Amended Mines Protocol] and the United Nations Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 (1997) [hereinafter Land Mines Convention].

9. Legality of the Threat or Use of Nuclear Weapons, *supra* note 3.

10. See William J. Fenrick, *The Development of the Law of Armed Conflict through the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, and Theodor Meron, *War Crimes Law for the Twenty-First Century*, both in this volume.

11. U.S. War Dep't, General Orders No. 100, April 24, 1863, *reprinted in* THE LAWS OF ARMED CONFLICTS 3 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988).

12. *Id.*, art. 16. For a discussion of this aspect of the Code, see Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213 (1998).

13. Brussels Conference, Project of an International Declaration Concerning the Laws and Customs of War, 1874, Arts. 12 & 13, 65 Brit. and Foreign State Papers (1873-74) 1005, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 11, at 25. The declaration never entered into force.

14. Institute of International Law, Manual of the Laws of War on Land, 5 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 156 (1881-82), *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 11, at 35.

15. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, 1868, 58 Brit. and Foreign State Papers (1867-68) 16 [hereinafter St. Petersburg Declaration], *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 11, at 101.

16. Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention No. IV, Oct. 18, 1907, 2 U.S.T. 2269, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 11, at 63 [hereinafter Hague Regulations]. The 1907 Regulations were a revised version of an earlier set of regulations annexed to Hague Convention No. II, July 29, 1899, 2 U.S.T. 2042, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 11, at 63.

17. 1 AM. J. INT'L L. 155 (1907 Supp.), *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 11, at 105

18. *Id.* at 157, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 11, at 109.

19. *Id.* at 153, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 11, at 201. The Declaration was renewed in 1907 until the opening of the Third Peace Conference, an event which has never occurred. 2 AM. J. INT'L L. 216 (1908 Supp.), *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 11, at 201. This Declaration is no longer regarded as being in force and, unlike the other two, is not considered to be declaratory of a rule of customary international law.

20. Hague Regulations, *supra* note 16.

21. T.S. No. 541, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 11, at 803. For a particularly interesting discussion of this treaty, see HOWARD S. LEVIE, *MINE WARFARE AT SEA* (1991).

22. *Supra* note 6.

23. *Supra* note 6.

24. *Supra* note 6.



25. Geneva Convention No. I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (1950); Geneva Convention No. II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (1950); Geneva Convention No. III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (1950); and Geneva Convention No. IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (1950). The four Conventions are *reprinted* in THE LAWS OF ARMED CONFLICT, *supra* note 11, at 373, 401, 423, & 495, respectively.

26. Additional Protocol I, Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3 (1979), 16 I.L.M. 1391 (1977) [hereinafter Additional Protocol I]; Additional Protocol II, Relating to the Protection of the Victims of Non-International Armed Conflicts, 1125 U.N.T.S. (1979) 609, 16 I.L.M. 1391 (1977), *reprinted* in THE LAWS OF ARMED CONFLICT, *supra* note 11, at 621 & 689.

27. Additional Protocol I, *supra* note 26, art. 35(1) & (2).

28. *Id.*, arts. 51(2)-(5), 52(1) & (2). Most of these provisions reflect customary law, although that is not true of the prohibition of reprisals against civilian objects in Article 52(1) See Christopher Greenwood, *The Customary Law Status of the 1977 Additional Protocols*, in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 93 (Astrid Delissen & Gerard Tanja eds., 1991).

29. Additional Protocol I, *supra* note 26, arts. 35(3) & 55.

30. 31 U.S.T. 333, 1108 U.N.T.S. 151 (1978), *reprinted* in THE LAWS OF ARMED CONFLICT, *supra* note 11, at 163 [hereinafter the ENMOD Convention].

31. *Supra* note 7.

32. *Supra* notes 7 & 8.

33. U.N. CHARTER art. 51.

34. See Legality of the Threat or Use of Nuclear Weapons, *supra* note 3, at 262-3.

35. This principle, like the others mentioned in the present paragraph, is discussed in greater detail in Part IV, *infra*.

36. Additional Protocol I, *supra* note 26, art. 38.

37. Additional Protocol I, *supra* note 26, art. 39(2). This provision goes beyond the rules of customary law, which prohibited the wearing of enemy uniforms only during an attack itself. See *United States v. Skorzeny*, 9 War Crimes Reports 90. The fact that the law of naval warfare is entirely different from the law of war on land in relation to this matter is a further illustration of the absence of any clear humanitarian purpose behind this rule; see text accompanying notes 81-9 *infra*.

38. See text accompanying notes 7-8 *supra*.

39. The Conference also unanimously adopted a resolution to the effect that "the Conference is of the opinion that the restriction of military charges, which are at present a heavy burden on the world, is extremely desirable for the increase of the moral and material welfare of mankind." A. PEARCE HIGGINS, THE HAGUE PEACE CONFERENCES 67 (1909).

40. Kalshoven, *supra* note 1, at 214-15.

41. Chemical Weapons Convention, *supra* note 6. See also the discussion in Part IV, *infra*.

42. The same was true of the reaction to early firearms. See LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 122-3 (1993).

43. Records of the First Hague Peace Conference, published by the Netherlands Ministry of Foreign Affairs, 1907, Part II, at 65.

44. See Part IV, sect. 2, *infra*.

45. Prosecutor v. Tadic (Jurisdiction), 105 I.L.R. 419, 504-20 (1995). For comment, see the article by Fenrick, *supra* note 10, and Christopher Greenwood, *International Humanitarian Law and the Tadic Case*, 7 EUR. J. INT'L L. 265 (1996). For subsequent proceedings in Tadic, see 36 I.L.M. 908 (1997).

46. Prosecutor v. Tadic (Jurisdiction), *supra* note 45, at 516, para. 119.

47. Legality of the Threat or Use of Nuclear Weapons, *supra* note 3, at 266, para. 2(A), of the *dispositif*. The Court was unanimous on this point.

48. *Id.*, para. 2(B) (by eleven votes to three).

49. *Id.* at 247, para. 52.

50. Although the principle of necessity has frequently been seen as justifying violence, in reality it is a restraining principle, requiring belligerents not to injure, kill or damage unless that is necessary for the achievement of legitimate military goals. See Carnahan, *supra* note 12.

51. The first two are outlawed by the St. Petersburg Declaration, *supra* note 15, and the last by the 1899 Declaration No. 3, *supra* note 18.

52. The origins of this ban also lie in the principle that civilians should be protected from acts of violence and that indiscriminate weapons are prohibited. However, the influence of the unnecessary suffering principle is evident in the *travaux préparatoires* of both 1899 Declaration No. 2, *supra* note 17, and the 1925 Geneva Gas Protocol, *supra* note 6.

53. Hague Regulations, *supra* note 16, art. 23(a).

54. Protocol I to the Conventional Weapons Convention, *supra* note 30.

55. That would be the case where, for example, no more humane alternative was available.

56. 32 I.L.R. 626 at 634 (1963). See also Dissenting Opinion of Judge Higgins, Legality of the Threat or Use of Nuclear Weapons, *supra* note 3, at 585-7, and Kalshoven, *supra* note 1, at 234-6.

57. International Committee of the Red Cross, Conference of Government Experts on the Use of Certain Conventional Weapons (Lucerne, Sept. 9 - Oct. 18, 1974) 9, para. 24 (1975) [hereinafter Lucerne Conference].

58. St. Petersburg Declaration, *supra* note 15, at preamble.

59. For a somewhat extreme example of the "morale" argument, see the article by Major G.V. Fosbery, *Explosive Bullets and their Application to Military Purposes*, 12 J. ROYAL UNITED SERVICES INST. 15-27 (1869), discussed in Kalshoven, *supra* note 1, at 208-13.

60. This was the view of some of the experts at the Lucerne Conference, *supra* note 57, at 9, para. 25. Although this approach was challenged by other experts (see Kalshoven, *supra* note 1, at 235) it clearly reflects State practice and, in the view of the present writer, is a correct statement of the law.

61. For example, the use of armor-piercing weapons against tanks and warships has always been accepted as lawful, notwithstanding that they cause more grievous injuries to personnel than do simple anti-personnel weapons. Indeed, the use of inflammable bullets, banned by the 1868 Declaration at a time when they were employed as anti-personnel weapons, came to be accepted as lawful some fifty years later when they were used against aircraft, notwithstanding the effect which they can have upon air crew (although their use in a simple anti-personnel role remains unlawful).

62. Lucerne Conference, *supra* note 57, at 8, para. 23.

63. INTERNATIONAL COMMITTEE OF THE RED CROSS, THE SIRUS PROJECT: TOWARDS A DETERMINATION OF WHICH WEAPONS CAUSE "SUPERFLUOUS INJURY" OR "UNNECESSARY SUFFERING" (Robin Coupland ed., 1997).

64. *Id.* at 27.



65. Hans Blix, *Methods and Means of Combat*, in UNESCO, INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 135, 139 (1988).

66. For that reason, the present writer respectfully disagrees with Professor Françoise Hampson when she argues that Coalition forces in the 1991 Gulf fighting should have used infantry to clear Iraqi trenches rather than bulldozing those trenches and thus condemning large numbers of Iraqi soldiers to a death widely regarded as particularly horrific. In this writer's view, the avoidance of the Coalition casualties which trench fighting would have caused was a military advantage sufficient to ensure that the suffering inflicted upon the Iraqi soldiers manning the trenches was not "unnecessary." See Françoise Hampson, *Means and Methods of Warfare in the Conflict in the Gulf*, in THE GULF WAR 1990-91 IN INTERNATIONAL AND ENGLISH LAW 89, 104-7 (Peter Rowe ed., 1993).

67. Frits Kalshoven, *The Soldier and his Golf Clubs*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES 369-86 (Christophe Swinarski ed., 1986).

68. Unpublished paper submitted by Colonel (later Major-General) Sir David Hughes-Morgan, discussed in the Report of the Lucerne Conference, *supra* note 57, at 7-11.

69. See Part I, *supra*.

70. Additional Protocol I, *supra* note 26, arts. 48, 51(2) & 52(1). For these purposes, a combatant is a member of the armed forces (with the exception of medical personnel and chaplains) or someone who takes a direct part in hostilities [Art. 51(3)]. Art. 52(2) provides that:

In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action, and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.

71. *Id.*, art. 51(5)(b). This principle is also regarded as part of customary international law.

72. *Id.*, art. 57(2)(a)(ii).

73. On this subject, see ANTHONY P.V. ROGERS, LAW ON THE BATTLEFIELD 7-46 (1996), William Fenrick, *Attacking the Enemy Civilian as a Punishable Offence*, 7 DUKE J. OF COMP. & INT'L L. 539 (1997), and Christopher Greenwood, *Current Issues in the Law of Armed Conflict: Weapons, Targets and International Criminal Liability*, 1 SINGAPORE J. INT'L & COMP. L. 441, 459-62 (1997).

74. The annotated edition of NWP 1-14M gives as an example of an inherently indiscriminate weapon the "bat bomb" developed but never used by the U.S. Navy during the Second World War. This weapon would have consisted of a bat with a small incendiary bomb attached to it. The bats would have been released over Japan, U.S. DEPT OF THE NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (NWP 1-14M/MCWP 5-2.1/COMDTPUB P5800.1), para. 9.1.2, n. 12 (1997) [hereinafter ANNOTATED HANDBOOK]. See also JACK COUFFER, BAT BOMB (1992).

75. But see the comments of the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Martić* (Rule 61) 108 I.L.R. 39, 47-52.

76. Christopher Greenwood, *Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict*, in Rowe, *supra* note 66, at 63.

77. Additional Protocol I prohibits such attacks even by way of reprisal, but on this point the Protocol is not declaratory of customary law; Greenwood, *supra* note 28, at 110-111, and *Twilight of the Law of Belligerent Reprisals*, 20 NETH. Y.B. INT'L L. 35 (1989). The United Kingdom entered a reservation to the reprisals provisions when ratifying the Protocol in January 1998. Letter of 28 January 1998 to the President of the Swiss Confederation, not yet published.



78. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS, para. 1980 (Yves Sandoz et al. eds., 1987).

79. See the essays in THE LAW OF NAVAL WARFARE: TARGETING ENEMY MERCHANT SHIPPING (Richard Grunawalt ed., 1993).

80. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, 114 *et seq.* & 167–8 (Louise Doswald-Beck ed., 1995).

81. Although it has sometimes been suggested that poison and poisoned weapons are perfidious, the prohibition of those weapons, which has long been the subject of a specific rule, probably owes more to perceptions that they cause unnecessary suffering and are difficult to use in a discriminating way.

82. The prohibition of the unauthorized use of the United Nations emblem and the provision in Article 37(1)(d) were intended to apply only where the United Nations was involved in a conflict in a peacekeeping or other impartial role and not where the United Nations itself had committed forces to combat. Sandoz, *supra* note 78, para. 1560.

83. See text accompanying note 37, *supra*.

84. ROBERT W. TUCKER, THE LAW OF WAR AND NEUTRALITY AT SEA 138–42 (1955).

85. Additional Protocol I, *supra* note 26, art. 39(3).

86. SAN REMO MANUAL, *supra* note 80, at 186.

87. ANNOTATED HANDBOOK, *supra* note 74, ch. 12, esp. para. 12.7 & n. 23.

88. Contrast the explanation to paragraph 111 of the SAN REMO MANUAL, *supra* note 80, at 186, with TUCKER, *supra* note 84, at 140–1.

89. SAN REMO MANUAL, *supra* note 80, at 185.

90. ENMOD, *supra* note 30.

91. See, e.g. the paper by the International Committee of the Red Cross in Report of the Secretary-General on the Protection of the Environment in Times of Armed Conflict, United Nations Doc. A/48/269, at 25. See also ENVIRONMENTAL PROTECTION AND THE LAW OF WAR (Glen Plant ed., 1992).

92. See also art. 55. The terms “widespread, long-term and severe” in the Protocol do not carry the same meaning as “widespread, long-lasting or severe” in the ENMOD Treaty. Not only are the three requirements cumulative in Additional Protocol I, whereas they are alternatives in ENMOD, the *travaux préparatoires* of the two agreements demonstrate that “long-lasting” in the ENMOD Treaty was intended to refer to effects which lasted for approximately a season (see the Understanding adopted in relation to this term by the Conference of the Committee on Disarmament, quoted in DOCUMENTS ON THE LAWS OF WAR 377–8 (Adam Roberts and Richard Guelff eds., 1989)), whereas “long-term” in Additional Protocol I was intended to convey a sense of something to be measured “in decades rather than months.” Sandoz, *supra* note 78, at 417.

93. See the statement to this effect by the Federal Republic of Germany, VI OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE 115 (prepared by the Foreign Ministry of Switzerland). Articles 35(3) and 55 were not included in the list of provisions deemed to be part of customary law which appears in the International Committee of the Red Cross Commentary on the Additional Protocols (Sandoz, *supra* note 78, paras. 1857–9) and the International Court did not treat them as declaratory of custom in the *Nuclear Weapons* case, *supra* note 3, at 242, para. 31. See also Kalshoven, *supra* note 1, at 283.

94. ANNOTATED HANDBOOK, *supra* note 74, para. 8.1.3.

95. Legality of the Threat or Use of Nuclear Weapons, *supra* note 3, at 242, para. 30.

96. G.A. Res. 47/37 (1992) on the “Protection of the Environment in Times of Armed Conflict.” See also G.A. Res. 49/50.

97. See also SAN REMO MANUAL, *supra* note 80, at 119; ROGERS, *supra* note 73, at 127-9.
98. Hague Regulations, *supra* note 16, art. 22; Additional Protocol I, *supra* note 26, art. 35(1).
99. See, e.g., the view expressed by some participants at the Lucerne Conference, *supra* note 57, at 11-12. See also Helmut Strebel, *Martens Clause*, in 3 ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW 252-3 (R. Bernhardt ed., 1982).
100. Kalshoven, *supra* note 1, at 238.
101. On this point, see BLINDING WEAPONS (Louise Doswald-Beck ed., 1993).
102. See, e.g., B. Anderberg, O. Bring, & M. Wolbarsht, *Blinding Laser Weapons and International Humanitarian Law*, 29 J. PEACE RESEARCH 287 (1992).
103. See, e.g., the Memorandum of Law by the U.S. Judge Advocate-General of the Army, reprinted in BLINDING WEAPONS, *supra* note 101, at 367.
104. See Christopher Greenwood, *Analysis of the Law Applicable to the Use of Battlefield Laser Weapons*, in *id.* at 71, and the ensuing discussion.
105. 35 I.L.M. 1218 (1996). The text of the new protocol is also reproduced, together with a useful commentary, in Louise Doswald-Beck, *The New Protocol on Blinding Laser Weapons*, 36 INT'L REV. RED CROSS 272 (1996). At 30 April 1998 there were 24 parties to the Protocol.
106. See art. 3. Doswald-Beck, *supra* note 105, at 298, argues, however, that the use of laser weapons against optics systems is incompatible with the underlying intention of the Protocol.
107. Roberts & Guelff, *supra* note 92, at 479. For a commentary on the original Protocol II, see A.P.V. Rogers, *Mines, Booby-traps and Other Devices*, 30 INT'L REV. RED CROSS 521 (1990).
108. Original Mines Protocol, *supra* note 8, art. 2(1), defines a mine as "any munition placed under, on or near the ground or other surface area and designed to be detonated or exploded by the presence, proximity or contact of a person or vehicle."
109. Rogers, *supra* note 107, at 528.
110. See, e.g., the ICRC booklet, *Mines: A Perverse Use of Technology*; P. CORNISH, *ANTI-PERSONNEL MINES: CONTROLLING THE PLAGUE OF "BUTTERFLIES"* (R.I.I.A., 1994).
111. Amended Mines Protocol, *supra* note 8. At 30 April 1998 there were 19 parties to the Amended Protocol.
112. *Id.*, arts. 1(2) and (3).
113. Doswald-Beck, *supra* note 105, at 287. Some States have made declarations to this effect when ratifying the new Protocol IV; see, e.g., the declarations by Germany, Ireland and Sweden.
114. The United Nations Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997, art. 1., 36 I.L.M. 1507 (1997).
115. *Id.*, art. 2.
116. *Id.*, art. 9.
117. Chemical Weapons Convention, *supra* note 6. At 30 April 1998 there were 108 parties.
118. Roberts & Guelff, *supra* note 92, at 137. See also the prohibition on poison and poisoned weapons codified in Article 23(a) of the Hague Regulations in Land Warfare, 1907, and the 1899 Hague Declaration No. 2 Regarding Asphyxiating Gases, notes 17 and 20, *supra*.
119. See, e.g., the United Kingdom Reservation, reprinted in Roberts & Guelff, *supra* note 92, at 144. These reservations originally applied to the use of bacteriological weapons as well. For States Party to the 1972 Toxins Convention, however, reservation to the prohibition of such weapons was prohibited, so that the reservation of the right to use bacteriological weapons ceased to have any real substance. Even so, it was not until 1991 that the United Kingdom



withdrew its reservation of the right to use bacteriological weapons, 63 BRIT. Y.B. INT'L L. 700 (1992).

120. See the reports of a commission of experts established by the UN Secretary-General to inquire into allegations of the use of chemical weapons by Iraq, U.N. Docs. S/17130 (April 25, 1985), S/17932 (March 21, 1986), and S/18863 (May 14, 1987). The use of chemical weapons by Iraq was condemned in a Statement by the President of the Security Council on 21 March 1986. U.N. Doc. S/PV.2667, *reprinted in* RESOLUTIONS AND STATEMENTS OF THE UNITED NATIONS SECURITY COUNCIL, 1946–92, at 466 (K. Wellens ed., 1993)), but the Council's own resolutions were couched in cautious language and did not formally censure Iraq, let alone impose sanctions upon it. See S.C. Res. 598 (1987) & 620 (1988). Not until after the Kuwait conflict did the Security Council take action to seek out and destroy Iraq's stockpiles of chemical weapons. S.C. Res. 687 (1991).

121. See the speech by Iraq's representative to the United Nations in the Security Council on 16 February 1991. U.N. Doc. S/PV.2977.

122. For a detailed commentary, see W. KRUTZSCH & R. TRAPP, A COMMENTARY ON THE CHEMICAL WEAPONS CONVENTION (1994).

123. See Roberts & Guelff, *supra* note 92, at 137–8.

124. Chemical Weapons Convention, *supra* note 6, art. I, para. 5. See also art. II, paras. 7 & 9; KRUTZSCH & TRAPP, *supra* note 122, at 18 & 42.

125. KRUTZSCH & TRAPP, *supra* note 122, at 13.

126. See, e.g., the statement by the Government of the United Kingdom condemning Iraq's use of gas against Iraqi civilians at Halabja in 1988, 59 BRIT. Y.B. INT'L L. 579 (1988), quoted with approval by the Appeals Chamber of the International Criminal Tribunal for Former Yugoslavia in *Prosecutor v. Tadic* (Jurisdiction), *supra* note 45, at 517–18.

127. Dissenting Opinion of Judge Schwebel, *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 3, at 323–29.

128. See Chemical Weapons Convention, *supra* note 6, art. I, para. 1.

129. See *id.*, art. I, paras. 3 & 4.

130. The author appeared as one of the counsel for the United Kingdom in the proceedings before the International Court of Justice on the *Threat or Use of Nuclear Weapons*, *supra* note 3. The views expressed in the present paper are the personal views of the author and should not be taken as representing the position of the Government of the United Kingdom.

131. See *esp.* G.A. Res. 1653 (1961), 2936 (1972), 33/71 B (1978), 35/152 D (1980), 36/92 I (1981), 45/59 B (1990), 46/37 D (1991), 47/53 C (1992), & 48/76 B (1993).

132. See, e.g., N. SINGH & E. MCWHINNEY, *NUCLEAR WEAPONS AND CONTEMPORARY INTERNATIONAL LAW* (2d ed. 1989), G. SCHWARZENBERGER, *THE LEGALITY OF NUCLEAR WEAPONS* (1958), and the essays by Falk, Meyrowitz, and Weston in *NUCLEAR WEAPONS AND LAW* (Miller and Feinrider eds., 1984).

133. See *esp.* Written Observations of India, Malaysia, Nauru and the Solomon Islands.

134. See Written Observations of France, the Russian Federation, the United Kingdom and the United States of America. In the case of France, at least, this reflected a change of position. See also Kalshoven, *supra* note 1, at 266 *et seq.*; W. Hearn, *The International Legal Regime Regulating Nuclear Deterrence and Warfare*, 61 BRIT. Y.B. INT'L L. 199 (1990); and D. Rauschnig, *Nuclear Weapons*, in 4 *ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW* 44 (R. Bernhardt ed., 1982).

135. See Kalshoven, *supra* note 1, at 281–2.

136. For comment, see Richard Falk, *Nuclear Weapons, International Law and the World Court*, 91 AM. J. INT'L L. 64–75 (1997); Michael Matheson, *The Opinions of the International*



*Court of Justice on the Threat or Use of Nuclear Weapons*, *id.* at 417–35; and the symposium in 37 INT'L REV. RED CROSS 4–117 (1997).

137. Legality of the Threat or Use of Nuclear Weapons, *supra* note 3, paras. 71 and 105, part 2(B).

138. *Id.*, paras. 54–7.

139. *Id.*, para. 95.

140. *Id.*, para. 105, part 2(E).

141. See the criticism in the Dissenting Opinion of Judge Higgins, *supra* note 56, at 584–5.

142. Legality of the Threat or Use of Nuclear Weapons, *supra* note 3, paras. 94–5.

143. See, in particular, the Separate Opinion of Judge Fleischhauer, 1996 I.C.J. 305.

144. For further discussion of this point, see Christopher Greenwood, *Jus ad Bellum and Jus in Bello in the Advisory Opinion on Nuclear Weapons*, in THE ADVISORY OPINION OF THE INTERNATIONAL COURT OF JUSTICE ON NUCLEAR WEAPONS (P. Sands & L. Boisson de Chazournes eds., 1998).

145. Compare Condorelli, 37 INT'L REV. RED CROSS 9 (1997) with David, *id.* at 21.

146. Article 6 of the 1966 International Covenant on Civil and Political Rights, provides that:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Comparable provisions can be found in Article 2 of the European Convention on Human Rights, Article 4 of the American Convention on Human Rights, and Article 4 of the African Charter on Human and People's Rights.

147. General Comment 14(23), U.N. Doc. A/40/40, at 162, para. 4. For comment, see DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE 336 (1994).

148. See Written Observations of the Netherlands to the International Court of Justice, para. 27.

149. Legality of the Threat or Use of Nuclear Weapons, *supra* note 3, para. 25.

150. See, e.g., the decisions of the European Court of Human Rights in *Loizidou v. Turkey*, 103 I.L.R. 622 (1995) and 108 I.L.R. 443 (1996), and the European Commission of Human Rights in *Cyprus v. Turkey*, 23 E.H.R.R. 244 (1997), where the European Convention on Human Rights was invoked in a case of belligerent occupation.

151. See, e.g., the reliance by Mexico and the Solomon Islands in their Written Observations to the International Court of Justice on the Rio Declaration and other environmental texts.

152. Legality of the Threat or Use of Nuclear Weapons, *supra* note 3, para. 30.

153. *Id.*, paras. 30 and 33.

154. See Part IV (1) (d), *supra*.

155. Legality of the Threat or Use of Nuclear Weapons, *supra* note 3, para. 105, part 2(C).

156. 1986 I.C.J. 3.

157. Legality of the Threat or Use of Nuclear Weapons, *supra* note 3, para. 41.

158. See, e.g., Christopher Greenwood, *The Relationship Between Jus ad Bellum and Jus in Bello*, 9 REV. INT'L STUDIES 221 (1982), and *Self-defence and the Conduct of International Armed Conflict*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY 273 (Yoram Dinstein ed., 1989).

159. Legality of the Threat or Use of Nuclear Weapons, *supra* note 3, paras. 42–43.

160. 1996 I.C.J. 583. See also the views of Judge Ago as Rapporteur on State Responsibility for the International Law Commission, Eighth Report, II(I) Y.B.I.L.C. 69 (1980).

It would be mistaken . . . to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and

repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the 'defensive' action, and not the forms, substance and strength of the action itself.

161. See Chemical Weapons Convention, *supra* note 6, art. VII. For an example of national implementation, see the United Kingdom's Chemical Weapons Act 1996.

162. Legality of the Threat or Use of Nuclear Weapons, *supra* note 3, para. 105, part 2(F).

163. See FRANÇOIS HEISBOURG, *THE FUTURE OF WARFARE* (1998).

164. Additional Protocol I, *supra* note 26, at art. 49(1).

165. This duty is expressly stated in Additional Protocol I, Article 36, but is regarded as part of customary international law. The United States of America, for example, which is not a party to Additional Protocol I, has long had a scrutiny program of this kind.





# VIII

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## **Nongovernmental Organizations in Situations of Conflict: The Negotiation of Change**

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Françoise Hampson

**J**UST AS ARMIES PLAN FOR THE NEXT WAR by learning the lessons of the last, so nongovernmental organizations (NGOs) in looking towards the future base themselves on the problems and dilemmas of the recent past. If the number of in-house training sessions and conferences are anything to go by, NGOs think they have a variety of problems.<sup>1</sup> The last decade of the twentieth century is confronting them with unexpected challenges in situations of conflict. It is not that the NGOs are unfamiliar with conflict; something about recent conflicts has changed, with particular impact on NGOs.

Some of that change may simply be the prevalence, to a greater degree than in the past, of elements previously present. One such example is the attempt of the fighting parties to control the delivery of humanitarian assistance. This may be accompanied by novel, or apparently novel, forms of fighting. If an object of the fighting requires the direct and indirect targeting of the civilian population, this is likely to have an impact on NGO activities. If, for example, an object of the fighting is to bring about the removal of a portion of the population from an area (e.g., "ethnic cleansing"), the conduct of hostilities is

likely to take a different form from that of conflicts that are in effect a “simple” power struggle. In both cases, there may be displacement of the civilian population, but the manner in which that happens, the length of the resultant displacement, and the prospects for ultimate return, will be very different.

Another key change in the past decade with a significant impact on NGO operations is the likelihood that UN or UN-authorized military personnel, acting under a “peace-keeping” or “peace-enforcement” mandate, will be found in the theater of conflict.<sup>2</sup>

These developments have an impact not only on NGOs but also on inter-governmental organizations (IGOs), such as the United Nations High Commissioner for Refugees (UNHCR). The fact that both NGOs and IGOs are adjusting to changes, possibly in different ways, simply adds to the complexity of the situation. NGOs are more used to working alongside IGOs than with the military, but the IGOs are subject to different pressures in adjusting to change than are the NGOs. It can be as difficult to adapt existing relationships as to forge new ones. That process of adaptation is made more complicated when an IGO is given the role of co-ordinating NGO activities.<sup>3</sup>

Once NGOs recognize the need at least to reconsider existing practices, they are likely to encounter further difficulties. There may be a natural tendency to assume that existing practices based on experience are right for the particular NGO; challenges to assumptions, which appear to be truths to those making them, are painful. Each NGO has its own “mandate” or objective. Other organizations with different objectives may need to change, but they are the experts on their own areas of activity; in that field, the particular NGO has nothing to learn from others. Where, on the other hand, it is recognized that there may be something to learn from the experience and solutions of other NGOs, the question becomes, how relevant is the experience of others? To what extent can one NGO learn from the experience of others? At least by meeting together and sharing what each perceives to be its difficulties, there is the opportunity for individual NGOs to reflect on their own assumptions and practices.

This only serves to emphasize one of the clearest lessons of the past decade: NGOs cannot be lumped together. Their aims are different and their working methods are dissimilar. This means that in the same situation different NGOs will react differently. Both UN and UN-authorized forces and the parties to a conflict must avoid the assumption that all NGOs will react in the same way. Seen from outside, NGOs have more in common with one another than they do with IGOs or other groups present in theater. Seen from within an NGO, however, the view may be otherwise. The goals, working methods, and

previous experience of a particular NGO may make it easy for it to work with UNHCR, whereas another NGO may have problems with some of UNHCR's working methods.<sup>4</sup>

This paper will first examine the diversity of NGOs that may be found in conflict situations. There is no attempt to be comprehensive, an attempt that would be doomed to failure. The object rather is to *illustrate* the diversity. The variety of conflict situations in which NGOs may find themselves will then be considered briefly. There is an interplay between the type of NGO and the varieties of conflict situations which is likely to affect the NGOs' priorities and their perceptions of the problems. There will then be an examination of certain commonly recurring themes. Again, there is no claim to be comprehensive in either the identification of the themes or their treatment. The themes in question are humanitarian assistance, medical activities, neutrality, the reporting of violations of applicable legal norms, and the accountability of NGOs, including the role of the media. The paper will conclude with a highly speculative and personal view of likely trends in the short to medium term.

### The Diversity of NGOs

Any attempt to classify NGOs must be accompanied by two notes of caution.<sup>5</sup> First, classification is a tool of convenience, not a straitjacket. Second, an NGO may fall into more than one of the categories.<sup>6</sup> It must also be remembered, when considering NGOs in situations of conflict, that many of the NGOs present may not be conflict-specific because they were already working in a State when the fighting broke out.<sup>7</sup> That can include both local and out-of-country NGOs. This situation is likely to be particularly true of the first category.

**Development NGOs.** Development NGOs often have long-term projects in a country. Their activities usually fall into the field of economic and social rights. They are involved in the development of the local infrastructure for the provision of essential needs. They may be group specific (e.g., women and children<sup>8</sup>) or resource or issue specific (e.g., water or appropriate technologies<sup>9</sup>). They may work throughout one or more States or just within a certain distinct region(s). As the view of such assistance has changed in the West from "charity" to development assistance, much greater attention has been paid to capacity building within the recipient community and to encouraging the participation of those whom the project is designed to assist.<sup>10</sup> This involves listening as well as doing. Sustainability is more important than



speed. Many NGOs in this group will be used to working with or through governmental infrastructures, which may have the effect of helping to strengthen them.<sup>11</sup> In building up local capacity, the NGOs are seeking to avoid creating dependency.

Since their work is not conflict related, there are no “sides,” simply people in need of assistance. The question of neutrality and impartial assistance to all sides does not arise. This enables development NGOs to confine their activities to one area within the State, even if the same need exists elsewhere.<sup>12</sup> For this group doing something somewhere is better than doing nothing at all.

**Relief NGOs.** Relief NGOs are specialists in disaster assistance, whether the disaster is man-made or natural. They have no long-term commitment to a particular people or place, but rather seek to meet acute needs during periods of crisis. The issue of capacity building, or even infrastructure building, is not generally applicable. Involving the recipient community is much less important for relief NGOs, but they have been affected by the debates within development NGOs and may make token gestures in this direction. There is a danger that they may ignore the impact of relief on the local economy.<sup>13</sup> This may have a negative impact on long-term capacity-building, including the capacity for crisis management. The impact of relief can also be positive, as where the volume of relief available destroys a black-market.<sup>14</sup> The relief NGOs need to be experts in logistics and able to function autonomously. They cannot rely on finding an infrastructure in place, whether that be roads or governmental institutions.

Some relief NGOs have built up a wealth of experience in a variety of theaters of conflict. They are aware of the need to negotiate with parties in control on the ground and realize the dangers in such negotiations. They are used to debates about their “neutrality” and of the need to be, and to appear to be, impartial.

Other NGOs operate in a different way. Some are not NGOs in the traditional sense. Groups of individuals, troubled by a particular conflict, might put together a truck load of the relief they assume to be necessary. They may even manage to send a small convoy of trucks to the conflict zone, with a view to distributing the relief. Such individuals have enthusiasm and commitment but a total lack of experience.<sup>15</sup> They have no knowledge of what is needed where. They have no experience of negotiating relief through zones of conflict. They may fail to recognize signals of personal danger. A problem arises when, unwittingly, their activities prejudice better organized and more significant (in terms of volume) relief efforts. The individuals involved should be encouraged

to put their efforts into fund-raising for experienced relief NGOs. The difficulty is that established NGOs can hardly make such an argument; it appears to be born of rivalry or a fear of competition. Others must assume the responsibility for making the argument.

If the group just discussed may be seen as exasperatingly naïve amateurs, a much more serious problem is caused by relief “cowboys.” Certain NGOs want to be seen as getting through to the places others cannot reach, whatever the price. The price paid, in terms, for example, of diverted relief supplies, will not be seen on television screens, but their presence will be. They are very dependent on donor support and therefore need to have a high profile presence in the areas of acute need, where the television cameras are most likely to be. Not only do such groups cause problems in theater, where the conflicting parties may assume that they can exact the same price from all relief agencies or that all such NGOs will behave in the same way, but more traditional relief NGOs may find themselves in competition with them for donor support. If the latter are seen to be doing something, they may attract greater financial support from individuals than more responsible, lower profile NGOs. This, in turn, may affect the conduct of the well-established NGOs. In order to maintain donor support, they may be tempted to ignore certain well-established principles of their *modus operandi*.<sup>16</sup> There is little that can be done to regulate the “cowboys.” The well-established relief NGOs can, however, reinforce their own adherence to certain principles. They can agree with one another to make joint appeals in emergency situations and to distribute the resultant “kitty” according to an agreed formula.<sup>17</sup> This avoids competitive fund-raising. Under the leadership of the International Committee of the Red Cross (ICRC), a code of principles has been agreed upon for the delivery of humanitarian assistance.<sup>18</sup> It is to be hoped that governments, which are often, directly or indirectly, very significant donors to relief operations, will make their funding conditional upon adherence to these principles.<sup>19</sup>

**Medical NGOs.** Development and relief NGOs may, of course, work in the medical field. In addition, however, there are dedicated medical NGOs which offer medical treatment in situations of conflict. What might be termed “medical/development assistance” includes group specific activity, such as that related to the promotion of women’s health,<sup>20</sup> and action related to a specific medical field.<sup>21</sup> The work may be part of a larger development program or may be the only activity of the organization. Certain medical concerns, notably female reproductive health, need to be handled with even greater cultural sensitivity than general development issues. Where the medical activity



involves dealings with patients and is handled by medical personnel, issues of medical ethics may arise, particularly with regard to confidentiality.<sup>22</sup>

The provision of medical services in situations of conflict is particularly the province of the ICRC and Médecins sans Frontières (MSF). This is what distinguishes such organizations from relief agencies that include medical goods in their consignments. The ICRC and MSF send medical teams into the field, including specialists in war surgery.<sup>23</sup> The two organizations are keenly aware of what distinguishes them from one another.<sup>24</sup> From the outside, it is clear that they have very different ground rules with regard to where they will go and under what conditions. When it comes to the treatment of patients, both sets of medical personnel are bound by and apply the rules of medical ethics.<sup>25</sup> They are marked out from other relief organizations not only on account of their adherence to a particular code of ethics; situations in which they have to work often require them to apply the principle of "triage" in assigning priority of treatment. In this, they have much in common with the medical services of armed forces.<sup>26</sup> They are not, however, subject to the constraints of a military hierarchy or military discipline.

**Movement NGOs.** There are many NGOs working with refugees and asylum seekers, but this tends to be in the country of refuge, rather than in the place from which they are fleeing. Development and relief NGOs may work with refugees and internally displaced persons (IDPs), but they do not generally focus on the cause of displacement; rather, these NGOs deal with current needs. Human rights NGOs may address the causes of refugee displacement, but in the context of human rights violations rather than the resultant displacement. UNHCR is, of course, an agency concerned with the causes and effects of displacement. If there are NGOs that focus specifically on displacement (such as I.O.M.), they are not as well known as the most prominent development, relief, medical or human rights NGOs.

**Human Rights NGOs.** The majority, and certainly the best known, of the human rights NGOs work principally in the field of civil and political rights. There are, nevertheless, certain NGOs that work outside the area of conflict on what might be seen as survival rights or economic and social rights, such as those to food and shelter.<sup>27</sup> In addition, certain development NGOs articulate at least some of their activities in human rights language.<sup>28</sup> What the human rights NGOs have in common is that they do not deliver assistance or services in the field in the same way as the organizations so far discussed. This does not



mean that they do not have a field presence; their function is, however, very different.

Insofar as human rights violations are a significant cause, or symptom, of impending conflict, timely and effective response to the concerns articulated in the reports of NGOs would represent a form of conflict prevention. Yet it happens all too rarely.

The principal tool of human rights NGOs is the report. Such reports aim to attract publicity in order to secure the "mobilization of shame." Human rights NGOs vary significantly in the use they make of their reports for lobbying. Many are not membership organizations, although they may have subscribers. Amnesty International is unusual in being not only a membership organization but one which relies heavily on the campaigning activities of members. This includes putting pressure not only on their own governments with regard to the situation in another country but also on the offending government by letter writing to a wide range of public officials. Many of the human rights NGOs make effective use of the UN human rights machinery by, for example, submitting information to UN thematic and Special Rapporteurs and to the Human Rights Committee established under the International Covenant on Civil and Political Rights.<sup>29</sup>

The human rights NGOs once showed a certain initial reluctance to get involved in legal questions arising out of the conduct of hostilities. They often found themselves reporting on violations of human rights that occurred in situations of non-international conflict, particularly in central America, but tended to concentrate on the impact on civilians. Since human rights law directly binds only State authorities, they tended to focus on human rights violations carried out by police and armed forces.<sup>30</sup> This exposed them to the charge of one-sidedness, since they did not address "violations" by non-governmental entities.

The pattern with regard to human rights reporting, however, has changed markedly over the past decade. Human Rights Watch led the way in analyzing situations and particular actions from the standpoint of humanitarian law as well as human rights law. This enabled them to examine the conduct of military operations.<sup>31</sup> Amnesty International has, more cautiously, begun to follow suit.<sup>32</sup> This is partly the product of a change in the pattern of human rights violations. While individual cases of arbitrary detention, torture, and unfair trials continue to exist, situations of gross and systematic violations of human rights have acquired greater prominence through conflicts such as those in Somalia, the former Yugoslavia, and Rwanda.

The human rights NGOs also now seek to address "violations" perpetrated by non-governmental entities. The language used and the campaigning tools

are different, but these base themselves on the same standards as those applicable to States.

Human rights NGOs need reliable sources of detailed information. One of the obvious potential sources in situations of conflict is the personnel attached to development, relief, and medical NGOs. This has given rise to real dilemmas for the latter, who fear that their neutrality and impartiality may be called into question if they provide information on violations of human rights or humanitarian law, however objective and impartial the reporting. This may prejudice their ability to continue providing relief to those in need. (This problem will be considered further below.)

It has been seen that a wide variety of NGO actors may be found in situations of conflict, with very different functions and views as to the principles applicable to their activities. A further, extremely significant, variable is the type of situation in which they find themselves operating.

### The Diversity of Situations

***Before the Fighting.*** Many, but not all, recent conflicts have arisen in States receiving some form of development assistance. In some cases, the assistance has taken a traditional form, that is to say, the development of infrastructures to meet the basic needs of the population. In more recent years, direct or indirect government-funded assistance has sometimes come with strings attached. (Conditionality will be examined further below.) In the case of Eastern Europe and the former Soviet Union, assistance has taken the form of help in adjustment, rather than development. What has been sought, notably by the Organization for Security and Cooperation in Europe (OSCE), has been the promotion of the institutions and mechanisms of civil society.

In many cases, conflict is the direct or indirect result of weak State structures.<sup>33</sup> Where chronic instability has prevented effective nation-building, governmental structures are weak, and the outbreak or intensification of fighting presents a challenge that overwhelms them. In other cases, the precipitating element may be the aftershocks brought about by the implosion of the former Soviet Union. Where the conflict is a reaction to an autocratic regime, it may be the indirect result of weak State structures, however paradoxical that may appear. Nervous governments faced with challenges to their authority do not have the confidence to allow space for dissent or to negotiate the challenge; instead, they respond with oppression, thereby contributing to that which they most fear.



The development NGOs are not well placed to address these concerns, beyond attempting to meet survival needs and, through cooperation with government agencies, seeking to instill good practice. They are, however, well placed to observe and to send warnings to the international community. Development agencies sent the clearest possible signals about the deteriorating situation in Somalia, but to no avail.<sup>34</sup> From outside the countries involved, human rights NGOs may send similar warnings. That happened most notably in the case of Rwanda.

**During the Fighting.** The fighting may make it impossible to continue with development assistance, either on account of the hostilities or of the resultant dislocation, such as the displacement of the population. There will suddenly be a change in the political and legal context, and a plethora of new players in the field. It is all too easy, in an academic or bureaucratic ivory tower, to forget the chaos engendered by an ever-changing political and military situation, about which there is usually inadequate and/or outdated information, and by the constant need to achieve new means of cooperation with ever-changing organizations. It is little wonder if NGOs simply react to events.

NGOs with the most experience in conflict situations are likely to be those which have developed *modi operandi* to cope with predictable chaos. The difficulty, however, is that while chaos is predictable, its particular form is not. Emergency relief NGOs will not have the experience of the particular society and culture that development NGOs will have gained.

The apparently rigid principles of the ICRC may give the impression that they can cope with high levels of chaos and rapid change.<sup>35</sup> They simply follow their tried and tested principles. The danger, however, is that the principles become a straitjacket that prevent the ICRC from adapting to changing circumstances.<sup>36</sup> At least as great a problem is presented by NGOs that have not thought through in sufficient detail their principles of action and cooperation. They may be tossed around by circumstances, consoling themselves with their bottom line: "do no harm."<sup>37</sup>

It would be presumptuous to propose solutions either to the ICRC or to less experienced NGOs. They can only be urged to take the time to debrief their personnel and attempt to identify, and then learn, the lessons to be learned. Even as they do so, they should avoid reassuring but illusory certainties; just as every NGO is different, so is every conflict.

The same problems will also beset any UN or UN-authorized forces in the field. They need to avoid the dangerous tendency of lumping all NGOs together. This might best be avoided if they got to know them individually. It is



too late when they meet one another in theater. Getting to know and understand the NGOs (and vice versa) needs to happen before deployment, ideally through joint training exercises.<sup>38</sup> This will not remove all causes of conflict, but it may remove some and enable them to predict others. The same is true of the relationships *between* NGOs.<sup>39</sup> One of the lessons of recent peacekeeping and peace-enforcement operations is that all parties in theater need not only to know their enemies, but also their friends.

***Towards the End of the Fighting.*** The fighting may come to a halt owing to war-weariness, temporary or longer-term, or as a result of some form of cease-fire, however fragile. There will inevitably be a need for assistance in reconstruction. Even if there are still legacies of the fighting to be dealt with, such as the disarming of fighters and the (re)creation of an effective and accountable police force,<sup>40</sup> the language of discourse will shift from humanitarian law to human rights law, from relief to development. Since the foundations for the post-conflict future will have been laid during the conflict, it is as important that those laying the foundations understand what will come next as it is that those involved in reconstruction understand the foundations on which they are building. Human rights language is not the same as humanitarian law language, even though both are premised on the inherent dignity of the individual and the protection of the vulnerable. The two types of analysis complement one another.<sup>41</sup> All the players, before, during and after the conflict, need to be familiar with both.

The problems with which NGOs, and governments as major funders of their operations, will have to grapple vary depending on the NGO and the situation. Nevertheless, certain common themes do arise.

### Humanitarian Assistance

In the constantly changing reality of the situation on the ground in Somalia, the former Yugoslavia, Liberia, and Rwanda, any number of elements may appear to have contributed to the result. That result may be a starving populace, deprived of humanitarian assistance, or the massacre of refugees, or the slaughter of innocents in UN-proclaimed "safe areas." It may be difficult to distinguish secondary elements from the irreducible kernel of hard choices. That effort must be made by NGOs, IGOs, and governments working together if the dead of this decade are not to have died in vain.

All the conflicts have been marked, to a greater or lesser degree, by the difficulty both NGOs and IGOs experienced in getting humanitarian assistance

to those who needed it. It is not surprising that the attention of NGOs has turned to better coordination of relief efforts and to what must appear to be deficiencies in the legal rules applicable. There is always a need to improve coordination, but that is hardly an answer to denial of access to populations in need.<sup>42</sup> Similarly, any examination of the legal rules applicable, whether in international or non-international conflicts, suggests that the problem does not lie there, although the failure to respect the rules is a problem.

In an international conflict, starvation of civilians as a method of warfare is prohibited.<sup>43</sup> That does not extend to situations where starvation is the foreseeable result but not itself the tactic. Relief operations that are humanitarian and impartial in character should be undertaken, subject to the agreement of the Parties concerned.<sup>44</sup> The Parties are required to allow and facilitate rapid and unimpeded passage of relief, even if it is destined for the civilian population of the adverse Party.<sup>45</sup> The Parties have the right to prescribe the technical arrangements, which include, but are not confined to, the right to search relief convoys to confirm that they do not include military equipment.<sup>46</sup> Relief personnel are to be protected, but their participation is subject to the approval of the Party in whose territory they will carry out their duties.<sup>47</sup> While the language of the provision on humanitarian assistance is mandatory, the requirement of consent is susceptible to abuse.

In non-international conflicts to which Protocol II of 1977 is applicable, relief actions of an exclusively humanitarian character should be undertaken, but subject to the consent of the High Contracting Party concerned.<sup>48</sup> The Protocol does not require the consent of the non-State forces because that might appear to grant a certain status to the "rebels" and would be seen as interference in the internal affairs of the State concerned. Starvation of civilians as a method of combat is again prohibited.<sup>49</sup>

In non-international conflicts to which only common Article 3 of the Geneva Conventions of 1949 is applicable, there is no provision on the delivery of humanitarian assistance. An impartial humanitarian body may, however, offer its services to the Parties to the conflict, and that offer cannot be claimed to constitute an interference in the internal affairs of the State.<sup>50</sup>

No doubt there are gaps, and the law could probably be improved, but that is to miss the point. If the forces in control on the ground will not grant access to populations in need, then either the assistance convoys run the real risk of attack or they must be equipped to protect themselves. The consent of those in *de facto* control is a practical prerequisite to the unarmed delivery of assistance.

Nor is the explanation plausible that the Parties are simply ignorant of the rules, that if only they knew them, then they would allow access to the



populations in need.<sup>51</sup> The reasons for the denial of access may vary, but improved dissemination of the rules is likely to have only a very limited effect.

The problem concerns not only access to populations in need, but also the lack of security of those people, whether they be in Sarajevo, in refugee camps, or in "safe areas."<sup>52</sup> A BBC radio news bulletin carried an interview with an inhabitant of Sarajevo during the siege of the city. He commented that the international community seemed not to mind that he would die one day from a sniper's bullet, provided he was not hungry at the time. Humanitarian assistance was a substitute for an overall policy.

The NGOs have recognized the linkage between the delivery of humanitarian assistance and the protection of the civilian population.<sup>53</sup> It is far from clear, however, that they have recognized that this may mean hard choices. Governments may be less inclined to assist in the delivery of humanitarian assistance if the price is high.<sup>54</sup> For some NGOs, to save one life is to save a universe. They would prefer not to have 90 percent of the aid diverted to people in less need of it. They would prefer not to have to turn a blind eye to the massacre of civilians. They are not prepared, however, to see one person starve if that can be prevented.

NGOs are born of idealism and commitment to those in need. It is not surprising that they should find it difficult to accept that the price of delivery of assistance may be too high. One must also be cautious about the greater willingness of governments, principal donors to NGOs, to contemplate such a possibility, unless it forms part of a policy designed to promote the greater good of the population. Determining that the price to be paid for delivery of humanitarian assistance is too high cannot simply be allowed to be a means whereby governments get themselves "off the hook."

Some NGOs see this attitude on the part of governments as an extension of "conditionality" in the development assistance field. It is submitted that while the two do have something in common, there is a difference in this context. There are two priorities *in relation to the population in need*. One is their physical security, the other the provision of humanitarian assistance. These priorities may, in a given situation, compete with one another.

The protection of the civilian population may also raise the question of the role of armed forces. In certain circumstances it may be necessary to deploy armed forces that are appropriately configured and equipped, and that have the mandate and, above all, political will to protect the civilian population. The attempts to date by the international community, with the exception of the "safe haven" in Northern Iraq immediately after its designation, have been



half-hearted and doomed to failure from the outset.<sup>55</sup> It may be that this is a job which should be done properly or not at all.

NGOs cannot afford to lose their impartiality, but that still leaves them with hard choices.<sup>56</sup> There may be a split between those that come to accept restrictions on the delivery of humanitarian assistance in order better to protect the civilian population, and those that cannot accept such restrictions. If governments channel their funding to the former, the latter will be dependent upon the support of individual donors. There may also be a split, not necessarily along the same lines, between those prepared to work with UN or UN-authorized forces and those that reject such cooperation on the grounds that it prejudices their impartiality. By establishing clear doctrine for peace support operations, including the tactical level, armed forces could contribute significantly to reducing the perceived problem.<sup>57</sup> It probably cannot, however, be completely eliminated. While the question of the role of armed forces and the debate between humanitarian assistance and protection overlap, they also need to be considered separately. The latter presents a real challenge to NGOs, whether or not the military are present.

### Medical Assistance

The essential dilemmas faced by those NGOs providing medical services are very similar to those in the field of humanitarian assistance generally, compounded by questions of medical ethics. Impartiality becomes individualized. The individual doctor is required to treat patients simply by reference to medical need.<sup>58</sup> This may be part of the explanation behind a distinction in the operating practice of the ICRC and MSF. For the ICRC, the provision of medical services is usually part of a larger operation. Its practice is to insist on working on both sides of a conflict in order to protect its own neutrality and impartiality. On the other hand, MSF, which similarly adheres to impartiality, sees no conflict between principle and only working on one side, or indeed in only one zone of one side, of the conflict. MSF medical personnel in the exercise of their functions are impartial. They will treat by reference to medical need alone, wherever they happen to be exercising those functions. MSF and the ICRC can work alongside one another, but MSF is also to be found where the ICRC does not or cannot go.<sup>59</sup>

The two organizations also take very different positions in relation to cooperation with human rights investigators and the two *ad hoc* war crimes tribunals. Again, in the case of the ICRC this may be partly attributable to the fact that it engages in a wider range of activity than the merely medical. There

is clearly a possible question of the confidentiality of the doctor-patient relationship.<sup>60</sup> Giving information with consent, however, is clearly a different question, and the two organizations take very different positions on it. (That will be discussed further in the next section.)

There is one particular medical issue that concerns not only these two organizations, but a wide range of other NGOs. It is best exemplified by the case of Irma Hadzimuratovic, a little girl who was seriously injured in Sarajevo in an incident in which her mother was killed.<sup>61</sup> She needed very swift medical intervention, which the medical personnel in Sarajevo were unable to provide because of their inadequate resources. Irma was eventually evacuated, thanks to the intervention of the British Prime Minister. It was, however, too late. Her injuries were by that time much harder to treat than they would have been, and she died some time later.

This raises some problems similar to the humanitarian assistance/protection debate, compounded by the question of evacuation. Is the answer to improve the quantity of medical relief if you are simply patching someone up to be injured again later? Is it better to evacuate injured persons for medical treatment if they then have to be returned to a war zone, than to do your best *in situ*? Should children be evacuated, but only with their parents?<sup>62</sup>

There were and are, in fact, criteria for determining questions of medical evacuation.<sup>63</sup> Irma was regarded as not coming within them. It might be useful if these were reexamined by, among others, the World Health Organization, the United Nations Children's Fund (UNICEF), medical and children's NGOs and as wide a range of interested parties as possible. There may be no need for change, but there does seem to be a need for at least a reconsideration of the issue.

### Neutrality, Impartiality and The Reporting of Violations of Humanitarian Law and Human Rights Law

**Reporting.** Human rights NGOs carry out their function by gathering information, analyzing it in terms of the applicable legal norms, and then publishing the results. To effect change, they need publicity and campaigning. While they would deny that they are other than impartial, their activities may be seen to be, or be claimed to be, "political." Indigenous human rights NGOs, where they exist, may be particularly vulnerable to suppression. International human rights NGOs tend to work from outside the conflict zone, with only a very limited field presence.



Traditionally, relief agencies kept their distance from human rights NGOs, for a variety of reasons.<sup>64</sup> Particularly during the Cold War, human rights activities were seen as “political.” The relief agencies were also worried about stepping outside their “mandate,” and there was perhaps a concern about the NGO equivalent of “mission creep.” They also saw cooperation with human rights NGOs as calling into question their independence and impartiality. They were worried about the use that might be made of information supplied to another organization and about the protection of witnesses. They were also concerned that their own access to civilian populations would be jeopardized if they were known to be supplying information to other organizations. Last, but by no means least, they felt ignorant about human rights law, which seemed to them a very different type of activity. They did not know on what to report.

There is no doubt that humanitarian agencies have a much larger field presence than human rights NGOs. They also encounter, on a day-to-day basis, the possible victims of violations of human rights law and humanitarian law.<sup>65</sup> Humanitarian NGOs are the passive recipients of information and, in other cases, are well placed to gather the relevant information more positively.

The situation in Rwanda seems to have marked a turning point. Oxfam was the first agency to declare that what was happening was genocide, and it paid a price for doing so. The attitude of NGOs who were blind and/or silent about what was going on around them, provided they could deliver humanitarian assistance, was heavily criticized in a paper by African Rights.<sup>66</sup>

Rwanda precipitated a period of soul searching on the part of relief NGOs. The first sign of a breakthrough was when a significant number of them recognized that evaluating actions in the context of human rights norms did not represent any loss of impartiality. That is to say that, while it may be done in a one-sided way, such reporting is not *inherently* partial or one-sided. The second breakthrough occurred when the relief agencies stopped to examine their oft-repeated mantra—“neutrality, impartiality, and independence.” The ICRC principles dictate that its activities must be based on neutrality and impartiality.<sup>67</sup> Many relief NGOs became very suspicious of neutrality, seeing it as an excuse for remaining silent in the face of atrocities. If neutrality meant never taking sides, they wanted to take the side of upholding universal legal norms based on the rights of all individuals everywhere. They were on the side of victims of violations, whoever they were. In other words, they would be evenhanded in applying the same principles to everyone. This led them to proclaim their impartiality and independence, but not their neutrality.<sup>68</sup>

While this evolution facilitated improved cooperation between relief NGOs and human rights NGOs, it did not, and could not hope to, remove all the



problems. Some difficulties, such as the need to provide a minimum of human rights law training to relief personnel in the field, can be addressed over time. Others are more problematic. Whether being known to provide information to human rights NGOs will result in a relief agency being ordered out of the country or denied continued access to the population in need cannot be answered in the abstract. The experience in that regard is not all negative. Indeed, as noted at the Médecins sans Frontières Conference in February 1996, "the real risks to our operations and our ethics lie in silence. And there are plenty of examples where human rights advocacy has in fact increased access to the victims and improved the safety of our staff, as was the case in Burundi."<sup>69</sup> The protection of witnesses is also a very real problem, as the experience of those who have testified in Arusha, Tanzania, before the war crimes tribunal and then returned to Rwanda has shown.

There may, nevertheless, be a shift in attitude. If the starting point of relief NGOs is that they will gather information, in some cases seek it, and then pass it on to responsible human rights NGOs (where they feel it to be safe to do so and where they have the requisite guarantees as to the use to which the information will be put), then the effectiveness of human rights reporting could be transformed. Even if the relief agencies were only able to indicate likely witnesses and sources of information, this would still be of considerable assistance.

What is particularly striking is the leading role played by a medical NGO in promoting the cooperation between relief agencies and human rights NGOs. They might have been thought to have the biggest problem with the sharing of information. Nevertheless, MSF has taken the lead and may have encouraged other NGOs by its example. Of course, there is a separate question in relation to the sharing of information. It is one thing to cooperate behind the scenes with human rights NGOs. It is quite another thing to give evidence in criminal proceedings before an international criminal tribunal.<sup>70</sup>

**Giving Evidence.** While the ICRC's policy is never to cooperate in this way,<sup>71</sup> some intergovernmental agencies, such as UNHCR, have sought to strike a balance between protecting their clients' confidentiality and giving evidence. Other organizations and individuals, even within the same group, have taken differing positions.<sup>72</sup> Again, MSF has been in the forefront of those promising the greatest possible cooperation with the tribunals. In relation to the giving of evidence at the request of the prosecutor, the rules of evidence give NGOs a certain protection.<sup>73</sup> It remains to be seen what will happen when the defense seeks to call an NGO employee as a witness and argues that the testimony is

vital for a fair disposal of the case. If the judges agree and subpoena the individual in question, a refusal to appear may result in contempt proceedings, even, it would appear, *in absentia*.<sup>74</sup> It is to be hoped that the judges will recognize that in some cases there may be legitimate grounds for the refusal to answer a question. That will be, and should be, determined by the judge and not the NGO employee.

**Advocacy and Campaigning.** The twin issues of advocacy and campaigning raise many of the same issues for NGOs as the reporting of violations of human rights and humanitarian law. In some cases, the law on charities imposes restrictions.<sup>75</sup> Some organizations have, nevertheless, become frustrated by only treating symptoms and have begun to campaign about the causes of the problems which they are there to address. Oxfam and Christian Aid, for example, have campaigned regarding the causes of poverty and the cycles of emergencies. Handicap International, a French-based NGO that provides prostheses, became concerned about the extent of the need for artificial limbs on account of injuries from anti-personnel land mines (APMs) and put pressure on the French government to call for a conference to review the 1980 Conventional Weapons Convention.<sup>76</sup> This resulted in the revision of Protocol II of that Convention relating to the use of land mines.<sup>77</sup> While the revised text marked a considerable achievement, most notably by extending its application to non-international conflicts, it fell far short of what NGOs perceived to be the need—an outright ban on the use of APMs. (The Review Conference also adopted a new fourth Protocol on blinding laser weapons.)<sup>78</sup> Subsequently, a group of States, led by Canada, decided to negotiate a treaty banning the use of APMs, which was signed in Ottawa by 120 States in December 1997.<sup>79</sup>

The campaign to ban the use, manufacture, and stockpiling of anti-personnel land mines has been a quite remarkable achievement for NGOs. Even five years ago, it was unthinkable that such a treaty ban could be achieved. One may question the impact that the Ottawa treaty banning the use of APMs will have, since the most important users and manufacturers of APMs are not Parties to it, but this does not detract from the achievement of the NGOs.<sup>80</sup>

This was not the work of one NGO or even of a linked group, such as medical NGOs.<sup>81</sup> It represented a remarkable feat of organization to create a small international committee, with a coordinating function, and national organizations, consisting of a loose coalition of NGOs. The arrangements had to be both loose and flexible, to cope with the variety of mandates, objectives, and campaigning methods of the different types of organizations involved.



Participating groups included children's organizations, development NGOs, refugee groups, relief organizations, human rights NGOs, and arms trade groups. All these groups were able to find something which they were able to contribute to the campaign.

The important question for the future is whether this is a precedent or a "one-off" phenomenon. Certain features of the APM issue made it an ideal subject for a campaign. The scale of the problem was, and is, enormous. The principal casualties are civilian. It was relatively easy to understand the technology. The message was simple: what was sought was an outright ban on use, in which case a ban on manufacture and stockpiling was logical. The nature of the injuries and of the victims made a significant visual impact. One only has to consider the campaign on laser weapons designed to blind, which was running at the same time as the land mine campaign, to see how significant such features are. There were essentially only two organizations campaigning about laser weapons, the ICRC and the Arms Project of Human Rights Watch.<sup>82</sup> Those lobbying understood the technology and the issues, but there was never the mobilization of public opinion that occurred in relation to APMs.

The key question then becomes whether there are other weapons that might provoke the same reaction in the public as land mines. Concern has been expressed about the use of small caliber ammunition and cluster weapons, but it seems questionable whether they would lead to a mass campaign.<sup>83</sup> It is more likely to be the specialist NGOs that become involved. If a conflict were to occur with a widespread use of incendiary weapons, that issue might become the focus for a campaign but there is no sign of that at present. There may now be a generally higher level of awareness and concern about the environmental impact of spent munitions and the insecurity which both causes, and is the product of, high levels of expenditure on conventional weapons, but it seems unlikely that that awareness will become sufficiently focused to produce a campaign as effective as that to ban land mines.

At present, it would seem that the land mine campaign is likely to be unique, at least in its scale of public mobilization and the range of participating NGOs. Nevertheless, there are NGOs well placed to campaign about the use of other weapons, and a precedent now exists for a wide range of NGOs to work together. The first group will continue to be involved in campaigns about specific weapons. It is not possible to predict whether one of those weapons will seize the imagination of the public. It takes an unusual combination of factors to do so.



## The Accountability of NGOs

Accountability is not, in this context, confined to legal accountability, although it goes without saying that NGOs are subject to the laws of the places in which they work. It includes moral responsibility, particularly where third parties treat NGOs as having some such responsibility for their actions. It also includes accountability in the sense of cause and effect. Where a person or body responds to the activities of an NGO in a way that affects the ability of the NGO to continue with those activities, this might be seen as *de facto* or effective accountability, irrespective of whether it is "justified" or even reasonable. The NGO has to take into account the possibility of such a reaction when determining its course of action.

In a more restricted sense, accountability usually involves the attainment of goals. A person or body evaluates the performance of the NGO by reference to objective criteria. This requires both measurable goals and objective criteria of evaluation. When the beneficiaries of action are people, there are the usual difficulties in determining whether there should be a qualitative, and not merely quantitative, evaluation and, if so, how to set about it. Is it necessarily the case that NGO One is "better" because it delivers 1,200 tons of relief in the same time and/or for the same cost that NGO Two delivers a thousand tons? Is it necessary to consider the accountability of NGOs to recipients/beneficiaries and also to donors, both individuals and States? Consideration also needs to be given to the relationship between accountability and the role of the media.

**Accountability to Recipients/Beneficiaries.** Development NGOs have had, for quite some time, a sense of responsibility toward the people whom they are trying to help.<sup>84</sup> There has been a shift over the past forty or so years from the sense that the recipients are the beneficiaries of charity to a perception that the NGOs are working in collaboration with the local community. This has been articulated through such concepts as empowerment and participation, and has led to greater reflection about the impact of assistance within the community. These ideas began naturally to "leak" from development to relief operations.

There is a different paradigm in the case of activities relating to violations of human rights or humanitarian law. Human rights NGOs and the ICRC have been acutely aware of the potential risk to individuals, rather than the community, in publicizing names. It may be, but this is speculation, that the preoccupation of development/relief NGOs with communities rather than individuals contributed to their silence in the face of human rights violations. The recent recognition by relief NGOs that assistance cannot be divorced from

protection suggests that their position is evolving. It may be that their focus on communities means that they will only become engaged in protection activities where the violations are widespread and systematic. Provided they recognize that unpunished individual violations may become a practice, it may be necessary, in order to achieve a sensible distribution of roles, for relief NGOs to become involved in *action* only in the case of widespread violations. Human rights NGOs are probably better suited to dealing with individual cases. In that situation, relief agencies could help by passing on information.

It may be significant that MSF, a medical organization, is at the forefront of moves to get relief NGOs to consider the issue of protection. While medical activities might seem to be a type of relief action, they do involve the relationship between an individual patient and medical personnel. In other words, medical NGOs do not function only at the community level.

Ultimately, it does seem that all NGOs have a sense of responsibility toward recipients/beneficiaries. However, the form it takes differs, depending on the type of activity involved.

**Accountability to Donors.** It is necessary to draw a distinction between accountability to individual donors and to State or organizational donors, not least because the two constituencies may impose competing, if not conflicting, demands. In addition, organizations and States are more likely to require accountability in the most literal sense. The administration and control involved may deter some NGOs from even seeking such funding. Two different ideas may become confused in the minds of NGOs. One is accountability, which is some type of obligation to another person or body. The other is the desire of NGOs to carry out their activities in as many of the places where they are needed as possible. This requires money. It would be understandable if they sought to tailor their activities to what is most likely to appeal to their donor constituencies. This is not the same thing as an obligation of accountability to donors, even if it is articulated in those terms.

Individual donations may be closely linked to media coverage of the epicenter of a crisis. In that case, the NGO has to be seen to be there. On the other hand, State or organizational funding may have strings attached, either conditionality or something that looks like it. The NGO then has to determine whether it is simply interested in raising as much money as possible, or whether it has a view as to the maximum possible funding from one particular source which is consistent with its independence. For some this may mean a refusal to accept any governmental funding. That is more likely to be the case for human rights NGOs than for relief/development NGOs.



The need to maintain donor support and/or accountability to donors may have a direct impact on the activities undertaken. In particular, it may prompt an NGO to be involved in a highly visible relief program, irrespective of the price paid in terms of the diversion of relief or silence in the face of serious violations of the law.

**Accountability and the Media.** To consider generally the role of the media in conflict situations is beyond the scope of this paper.<sup>85</sup> Some commentators appear to assume that there is a "CNN factor," while others dispute that it has the significance often ascribed to it.<sup>86</sup> Some journalists think their role is to be objective and detached, whereas others aspire to what Martin Bell has described as "the journalism of attachment." That does *not* mean biased reporting: it means identifying with and conveying the plight of victims and daring to express anger and outrage.

As seen above, donor support may be affected by the coverage of an NGO's activities. That may, in turn, put pressure on the NGO to be not where there is most need or the greatest possibility of effective action, but where the cameras are. In some cases, NGOs can determine where the cameras go. The NGOs may be a principal source of information for the news media and also a source of relatively secure transport.

NGOs are generally aware of their need for media coverage and, over the years, have spent effort and resources in developing professional media strategies. It is less clear whether they are aware of possible dangers in their ambiguous two-way relationship with the media. In seeking to use the media to their own advantage, they may also be, deliberately or inadvertently, manipulated. It may be necessary to distinguish between the print media and television. When reference is made to the "CNN factor," it is only the latter which is being considered.

The question in this context is the extent to which NGOs are accountable for, first, the impact of media coverage where they make the coverage possible or are the subject of the coverage and, second, the effect of that coverage on their own operations. At the very least, this is a question that responsible NGOs should be asking themselves.

### The Future

Speculation is an inherently hazardous activity. It is not possible simply to examine where NGOs are now and to project that forward. There are many other variables, all of which will interact with one another, and which need to



be taken into account. First, there are possible changes in the causes and forms of conflict. Second, there is uncertainty as to the likely international response. The international community may decide that acute crises are too difficult to handle and must simply be contained until they burn out, or else it may discover the will to seek real solutions. Third, IGOs may adjust their priorities and *modi operandi* in various ways.

It is possible, on the basis of recent experience, to draw up a nightmare scenario. In it, parties to a conflict seek an unlawful goal and consequently engage in systematic violations of humanitarian law. The only concern of NGOs is to ensure that people are fed. They turn a blind eye to the fact that many victims will be dead in a few hours or a few days. Armed forces external to the parties to the conflict are helpless, either owing to inadequate numbers and equipment and an inappropriate mandate or else a fear of casualties, which means that they only move in such large numbers as to be incapable of influencing the situation on the ground. States, in the meantime, use assistance as a substitute for policy and as an excuse for closing frontiers to prevent mass movement of people. Some of these elements have been present in many recent conflict situations. If they are not to recur, lessons must be learned.

There is evidence that at least some NGOs are biting the very painful bullet. They have at least recognized that assistance needs to take account of the need for protection. There is not much value in "better fed than dead" if the recipients are going to be killed later. Some NGOs know they have to strike a difficult balance; discovering appropriate ways of doing so will not be easy. The ICRC, in some ways, exemplifies the dilemma. It has a wealth of experience and is used to relying on its demonstrable neutrality and impartiality. At the same time, this "guardian of humanitarian law" refuses to allow its delegates to give evidence before war crimes tribunals. There will be a certain degree of trial and error as NGOs seek a way forward, and no two situations are the same. Some of the NGOs are, nevertheless, looking for practical solutions.<sup>87</sup> It seems likely that there will be a split in the NGO community. Some will insist on delivering assistance, whatever the price. This group will include not only "cowboys," but those who see themselves as idealists. Others will, with reluctance, see how the wind is blowing, in particular with respect to State and organizational donors, and go along with it. Still others will be convinced of the need for adjustment, seeing it as providing more net help.

In this situation, it is not the responsibility of only the NGOs to adapt and change. States, particularly members of the Security Council, have a huge responsibility. They have so far proved incapable of responding to an impending crisis, even where the NGOs and the UN machinery have made it

clear what is at stake. Nor have States so far shown a willingness to bite their respective bullets. It is possible that the greatest single contribution that could be made to protecting victims from atrocities would be by breaking the cycle of impunity everywhere. The law of armed conflict is a useful tool because it is based on the equality of belligerents (in other words is impartial) and is based on individual criminal responsibility. To break the cycle of impunity requires an effective international criminal court with an independent prosecutor. States have to be willing to surrender their own soldiers to its jurisdiction. If they create a tribunal with fairness and integrity, and if they train their soldiers not to break the rules, they have nothing to fear from such a court. There is a great deal to gain.

If those resorting to force know that they are likely to be tried if they prosecute the conflict in unlawful ways, but will not be subject to the jurisdiction of the court if they only target combatants and military objectives, this might have a significant effect on their conduct. Not only would it facilitate the task of NGOs in negotiating access for humanitarian assistance, but the fighters would implicitly be recognizing the legitimacy of NGO involvement in the promotion of the rule of law by providing protection. If the belligerents recognize that there are unlawful ways of fighting, it cannot be a sign of bias or lack of neutrality to seek to uphold the law.

Only States, acting diplomatically and where necessary through their armed forces, can break the cycle of impunity. Only States can set effective controls on the transfer of weapons. Only States can wield the sticks and carrots appropriate to a particular situation. There is no shortage of rhetoric and hand wringing. There is, to date, a lack of effective action.

The NGOs, armed forces, and donor States are going to have to surrender long-cherished ideas if they are to reach an accommodation. They have learned that they cannot simply insist on doing things in their own way, without regard to others. They will have to recognize and adjust to the priorities and needs of the other players. This does not mean that they have to adopt them. The first step would be if they all spoke the same language. If they used humanitarian law, human rights law, and refugee law as tools, they might not say the same thing, but they would at least begin to understand one another.

This is beginning to happen between armed forces and at least some NGOs, and is most likely between those who have shared the experience on the ground. Donor States are reexamining questions of humanitarian assistance, but there is less evidence that they are assuming their particular responsibilities in relation to conflict prevention and breaking the cycle of impunity.



NGOs, armed forces, and donor States have recognized that they have the same ultimate goal—the effective assistance and protection of victims. They have also recognized that they need to search for ways forward, both separately and together. There is still a long way to go before they convert these ideas into practical solutions to the problems faced on the ground.

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Notes

1. Médecins sans Frontières (MSF) Holland, for example, organized a conference in Amsterdam on February 9, 1996. Conference on the Co-operation between Humanitarian Organisations and Human Rights Organisations. See also Symposium on Humanitarian Action and Peace-keeping Operations, Geneva, June 22–24, 1994, ICRC (Palwankar ed.); von Flüe, International Humanitarian Law and Protection, Report of the Workshop, Nov. 18–20, 1996, ICRC. The Asser Instituut in the Netherlands has organized seminars on UN law, human rights, and humanitarian law for Dutch NGO personnel. It is worthy of note that the NGO search for solutions to practical problems has involved training in the applicable *legal* norms. This suggests a useful role for the law not only in defining acceptable and unacceptable forms of conduct, but also as a common language of discourse through which actual experience can be articulated.

2. By “peacekeeping” is meant an operation based on the consent of the parties at every level, operational and tactical, in which the forces act impartially and can only use force in self-defense. By “peace enforcement” is meant an operation in which force can be used to achieve the mandated objective, not defined in terms of one of the parties. Force is to be used impartially or evenhandedly. There is no need for consent to the presence of the force at every level, though there will generally be some form of strategic political consent, probably halfhearted. See generally Hampson, *States’ Military Operations Authorized by the United Nations and International Humanitarian Law*, in *THE UNITED NATIONS AND INTERNATIONAL HUMANITARIAN LAW*, 371–426 (Condorelli ed., 1996).

3. E.g., UNHCR during the United Nations Provisional Force (UNPROFOR) operation in Bosnia-Herzegovina.

4. E.g., the issue of military escorts for the delivery of humanitarian assistance. See *infra*.

5. The role of the church and church agencies is not included, as such, within the scope of the text. Where a “religious” organization (e.g., Christian Aid) is involved in development or relief, it is considered along with other similar agencies. The *specific* role of the church is not, however, considered. It should be noted that the form of organization of the church, notably the existence of educated parish priests throughout a territory, represents a potentially invaluable source of detailed information, particularly in the human rights field. Individual priests and ministers, and the church itself, may play a more sinister role, as is alleged to have happened in Rwanda. See *AFRICAN RIGHTS, RWANDA: DEATH, DESPAIR AND DEFIANCE* (1994); *AFRICAN RIGHTS, WITNESS TO GENOCIDE*, No. 1, (Oct. 1995).

6. In particular, it is not uncommon for development agencies to remain in theater, adapting their projects to meet the needs of emergency relief, but in the context of their longer-term development goals.

7. E.g., Save the Children Fund (SCF) in Somalia.

8. Some NGOs have specific projects which focus on women’s needs in the context of a broader overall project, e.g., Ethiopia’s Addis Ababa Fistula Hospital project. Other NGOs concern themselves with the role of women in particular societies, notably with regard to health



issues and some agricultural concerns. The formal or informal education of women assumes a particular importance. Even those NGOs which are specifically trying to assist children, such as SCF, often do so through their mothers.

9. Wateraid seeks to assist in providing reliable access to safe drinking water. Intermediate Technology works with communities to develop an appropriate and locally sustainable technological solution to their problem.

10. E.g., Oxfam, SCF, and other well established development NGOs. *See generally* NATSIOS, U.S. FOREIGN POLICY AND THE FOUR HORSEMEN OF THE APOCALYPSE, ch. 4 (1997).

11. Certain development NGOs positively seek to work through such structures to encourage participation at all levels to avoid the risks of dependency and to promote sustainability. Even when political governmental structures have broken down, administrative structures may continue to function for a time (e.g., SCF's experience in Somalia). This gives development NGOs an advantage over incoming relief NGOs when the situation deteriorates into conflict. The former have already established contacts and have built up trust. *See generally* EDWARDS & HULME, NON-GOVERNMENTAL ORGANISATIONS: PERFORMANCE AND ACCOUNTABILITY, ch.1 (SCF and Earthscan, 1995).

12. This can be a problem in relation to the delivery of humanitarian assistance by relief agencies. *See infra*.

13. Relief in the form of foodstuffs can have the effect of undermining such activity as there is in the agricultural sector. In some cases, the provision of seeds and tools might provide significant quantities of food while encouraging the maintenance of local economic activity. *See generally* MACALISTER-SMITH, INTERNATIONAL HUMANITARIAN ASSISTANCE: DISASTER RELIEF ACTIONS IN INTERNATIONAL LAW AND ORGANIZATIONS (1985); MACRAE & ZWI, WAR AND HUNGER (1994).

14. E.g., in some areas in Somalia.

15. This was a particular problem in the case of the former Yugoslavia, probably owing to its proximity to and easy access from Western Europe.

16. This was said to be a problem for certain NGOs in relation to relief activities in Rwanda and adjacent States.

17. In the UK, seven big British aid agencies make up the Disasters Emergency Committee (DEC) to coordinate fund raising and avoid charges of poaching funds in each other's constituencies. In the early 1990s, the fight both to raise funds and to maintain a high profile with donors put the DEC under more strain than at any time in its nearly thirty year history. THE INDEPENDENT, Dec. 21, 1994.

18. INT'L REV. RED CROSS, No. 310, 1996, at 73, 119-127.

19. The significance of the role of governments as donors, directly or indirectly (as through European Union (EU) mechanisms) runs the risk of distorting the activities of NGOs and calling into question their independence. They need to maintain a balance between donor income, which ensures their ability to undertake independent action, and ear-marked governmental funding. The more they are dependent on governmental funding, the more they appear to be no more than subcontractors, and the more a government may be tempted to dictate terms.

20. This often involves issues of reproductive health, such as female circumcision and contraception.

21. E.g., Sightsavers which specifically assists in treating eye-conditions and in training local medical personnel to provide basic eye-care treatment.

22. *See generally* TORELLI, LE MÉDECIN ET LES DROITS DE L'HOMME (1983).

23. Since the ICRC surgeons have more experience in the field than most doctors with armed forces, the latter sometimes undertake placement in ICRC field hospitals in order to obtain the necessary experience.

24. On MSF, see LAURENT, MÉDECINS SANS FRONTIÈRES: LÀ OÙ LES AUTRES NE VONT PAS (1980), more recently LIFE, DEATH AND AID (Jean ed., 1993), and the conference referred to in note 1. On the ICRC generally, see HAUG, HUMANITY FOR ALL (1993), especially ch. 3; BUGNION, LE COMITÉ INTERNATIONAL DE LA CROIX-ROUGE ET LA PROTECTION DES VICTIMES DE GUERRE (1994). For the view of a very well informed "outsider," see FORSYTHE, HUMANITARIAN POLITICS: THE INTERNATIONAL COMMITTEE OF THE RED CROSS (1977).

25. On the contents of medical ethics in time of conflict, see TORELLI, *supra* note 22, and Hampson, *Conscience in Conflict: the Doctor's Dilemma*, 27 CAN. Y. B. INT'L L. 203, 211–215 (1989).

26. For an excellent account of what "triage" actually involves in the context of operations conducted by medical personnel with armed forces, see MCMANNERS, THE SCARS OF WAR, ch. 10 (1993), especially pp. 262–3. For a recent example of the real dilemmas which confront medical personnel, see *Incidents regarding the medical assistance provided to civilians by the Dutch Defence Hospital Organization (KHO) in former Yugoslavia*, Report by the Inspectie voor de Gezondheidszorg, 1996, Rijswijk. Something analogous to the principle of "triage" might be of assistance to relief agencies. See *infra*.

27. E.g., FIAN deals specifically with the right to food and the Centre on Housing Rights and Evictions (COHRE) with the right to housing.

28. SCF (UK) is increasingly using the language of the UN Convention on the Rights of the Child.

29. The thematic Rapporteurs include the Rapporteurs on Torture and on Extra-Judicial, Summary and Arbitrary Executions. Special Rapporteurs are country specific. States which have ratified the International Covenant on Civil and Political Rights (ICCPR) have an obligation to submit periodic reports on implementation, on which they are questioned by the Human Rights Committee. It should be noted that nonderogable human rights, which include the prohibition of torture, cruel, inhuman, or degrading treatment or punishment and the prohibition of arbitrary killings, remain applicable in situations of conflict. The State is responsible under human rights law for the actions of its armed forces, even where they act extraterritorially. See generally, THE UNITED NATIONS AND HUMAN RIGHTS (Alston ed., 1992), and MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE (1994).

30. Rodley, *Can Armed Opposition Groups Violate Human Rights*, in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE (Mahoney & Mahoney eds., 1993).

31. This has even extended to full-scale international armed conflicts. See, e.g., MIDDLE EAST WATCH, NEEDLESS DEATHS IN THE GULF WAR (1991). The application of some of the legal rules to the particular facts in that report is, in some cases, controversial.

32. E.g., Amnesty International, Israel/Lebanon, Unlawful Killings during Operation "Grapes of Wrath," in particular the analysis of the Israeli attack on the UN compound at Qana, on April 18, 1996.

33. See generally the papers produced for a DFID/Human Rights Centre, University of Essex Conference on the Promotion and Protection of Human Rights in Acute Crisis, Feb. 11–13, 1998.

34. MINEAR, SCOTT & WEISS, THE NEWS MEDIA, CIVIL WAR AND HUMANITARIAN ACTION 53–57 (1996); See also SAHNOUN, SOMALIA—THE MISSED OPPORTUNITY (1994); AFRICAN RIGHTS, SOMALIA, OPERATION RESTORE HOPE: A PRELIMINARY ASSESSMENT (1992).



35. ICRC sources, cited *supra* note 24. Plattner, ICRC *Neutrality and Neutrality in Humanitarian Assistance*, INT'L REV. RED CROSS, No. 311, 1996, at 161–179.

36. Following its recent experiences in Somalia, Rwanda, the former Yugoslavia, and Chechnya, among others, the ICRC has engaged in considerable soul searching regarding its *modi operandi* and in particular how to protect ICRC personnel from deliberate attack. This suggests that it is willing at least to contemplate changing its methods of operation should that prove necessary and desirable. It is less clear that any changes have, in fact, resulted from this process.

37. NATSIOS, *supra* note 10, at 73.

38. At the conference referred to in note 33, one suggestion was that when armed forces prepare contingency plans, well before there is any question as to their actual deployment, they should work together with NGOs and IGOs. Even if a particular plan were not implemented, the experience might contribute to mutual understanding. On the issue of military-NGO cooperation, see Roberts, *Humanitarian Action in War*, Adelphi Paper 305, 1996, at 65–69, and Palwankar, *supra* note 1.

39. MSF conference, *supra* note 1.

40. Even if there is a cease-fire, these activities can pose very real difficulties in the immediate aftermath of conflict. It may be that the disarming of fighters is best done by military forces, but the training of police by an international civilian police force, preferably unarmed. Examples of the difficulty in disarming former fighters include Angola and the position in Banja-Luka, Bosnia-Herzegovina, in the summer of 1997.

41. Hampson, conference paper, *supra* note 33.

42. A comprehensive review of the lessons to be learned from the operation in Rwanda is to be found in STEERING COMMITTEE OF THE JOINT EVALUATION OF EMERGENCY ASSISTANCE TO RWANDA, *THE INTERNATIONAL RESPONSE TO CONFLICT AND GENOCIDE: LESSONS FROM THE RWANDA EXPERIENCE* (5 vols., 1996). Sommaruga C., *Strengthening the Co-ordination of Emergency Humanitarian Assistance*, INT'L REV. RED CROSS, No. 304, Jan-Feb. 1995, at 81–86; Fuchs, *Emergency Co-ordination—A Problem of Humanitarian Agencies or Rather of Politicians and Generals?*, in *id.* at 87–93.

43. For the definition of an international armed conflict, see common Art. 2 of the Geneva Conventions of 12 August 1949 and Art. 1.4 of Protocol I of 1977, Additional to the Geneva Conventions of 12 August 1949; for the prohibition of starvation as a method of warfare, Protocol I, Art. 54 (1). For treaty texts, see ROBERTS & GUELFF, *DOCUMENTS ON THE LAWS OF WAR* (2d ed., 1989). See generally Allen, *Civilian Starvation and Relief during Armed Conflict: The Modern Humanitarian Law*, 19 GEORGIA J. INT'L & COMP. L. 1 (1989); Shotwell, *Food and the Use of Force: The Role of Humanitarian Principles in the Persian Gulf Crisis and Beyond*, 30 MIL. L. & L. OF WAR REV. 345 (1991); *Famine and War* (report of an ICRC Seminar by Mourey), INT'L REV. RED CROSS, No. 284, 1991, at 549; Plattner, *Assistance to the Civilian Population: the Development and Present State of International Humanitarian Law*, in *id.*, No. 288, 1992, at 249–263; MACALISTER-SMITH, *supra* note 13.

44. Protocol I, art. 70 (1).

45. *Id.*, art. 70 (2).

46. *Id.*, art. 70 (3).

47. *Id.*, art. 71 (1). The protection of NGO relief personnel from attack has been of increasing concern. ICRC delegates, for example, have been the victims of intentional attacks. The answer of the international community has been the UN Convention on the Safety of United Nations and Associated Personnel, G.A. Res. 49/59, Feb. 17, 1995, 34 I.L.M. 482. It may have a limited role to play in the protection of such personnel, where they come within its terms, but the major



problem is likely to be, as usual, enforcement. The general objection of this author to the Convention in relation to peace enforcement personnel does not apply in relation to associated personnel, but the criticisms based on the drafting are still relevant. See Hampson, *The Protection of "Blue Helmets" in International Law*, 36 MIL. L. & L. WAR REV. 203 (1997).

48. Note the high threshold for the applicability of Protocol II of 1977, Additional to the Geneva Conventions of 12 August 1949, even if it has been ratified by the party in question. Protocol II, art. 1. On humanitarian assistance, see *id.*, art. 18.

49. *Id.*, art. 14.

50. Common art. 3, Geneva Conventions of 1949. The article is binding on the parties (not just individuals) to a non-international conflict; in other words, it is not binding just for the State forces. Contrast human rights law, Rodley, *supra* note 30.

51. The deteriorating respect for international humanitarian law led to the calling of an International Conference for the Protection of War Victims, consisting *inter alia* of High Contracting Parties to the Geneva Conventions, in the summer of 1993. The Conference asked for an Intergovernmental Group of Experts to study practical means of promoting full respect for and compliance with international humanitarian law. Following a preparatory meeting, the IGE met in January 1995. The recommendations focused principally on the need for increased dissemination and domestic implementing legislation. While these may be necessary, it is submitted that it is inconceivable that they will be sufficient. Effective enforcement, including measures by States to persuade other States to exercise jurisdiction, is essential.

52. On the need for improved protection, see MSF, Conference, *supra* note 1; Roberts, *supra* note 38. On "safe areas," see Hampson, *supra* note 2, especially pp. 407 and 413.

53. MSF, Conference, *supra* note 1; ICRC, Workshop, *supra* note 1; MacKintosh, International Responses to Acute Crisis: Supporting Human Rights Through Protection and Assistance, paper for conference at *supra* note 33.

54. Hampson, *supra* note 2, at 413.

55. *Id.* at 383-386; Roberts, *supra* note 38, at 39-44.

56. Roberts, *supra* note 38, at 82-84. The hard choices bear a certain resemblance to "triage" in the medical field.

57. An example of such a doctrine is the British Army Field Manual, Peace Support Operations, First Draft, 1997. A possible functional distribution of roles is that the military should first create the conditions in which assistance can be delivered and protection afforded to civilians, possibly in demilitarized and geographically defined "safe areas." Then it might be easier for such assistance to be delivered and protection offered without the need for a high profile military presence. The forces would still need to be in theater and might need to patrol the perimeter of "safe areas."

58. *Supra* note 25.

59. Working together; MSF, Conference, *supra* note 1, at 17. MSF appears to have been the only external medical NGO in Srebrenica. *Supra* note 26.

60. There is a significantly qualified recognition of the confidentiality of the relationship in international law. Protocol I, art. 16(3) and Protocol II, arts. 10(3) and (4).

61. DI GIOVANNI, THE QUICK AND THE DEAD: UNDER SIEGE IN SARAJEVO 135-147 (1994).

62. Hampson, Legal Protection Afforded to Children under International Humanitarian Law, a report prepared for the Machel Study on the Impact of Armed Conflict on Children 66; Plattner, *Protection of Children in International Humanitarian Law*, INT'L REV. RED CROSS No. 240, 1984, at 140; Singer, *The Protection of Children during Armed Conflict Situations*, INT'L REV. RED CROSS, No. 252, 1986, at 133.

63. DI GIOVANNI, *supra* note 61, at 144.
64. MSF, Conference, *supra* note 1.
65. E.g., medical personnel may learn how patients received their injuries; those delivering relief may learn how the recipients came to need it.
66. African Rights, *Humanitarianism Unbound*, Discussion Paper No. 5, November 1994. See also Jean, *supra* note 24. On Rwanda, see AFRICAN RIGHTS, *supra* note 5.
67. BUGNION, *supra* note 24.
68. MSF, Conference, *supra* note 1, at 66.
69. *Id.* at 15.
70. Hampson, *The International Criminal Tribunal for the Former Yugoslavia and the Reluctant Witness*, 47 I.C.L.Q. 50 (1998).
71. *Id.* at 69-70.
72. E.g., some journalists are willing to testify, but not others. *Id.* at 63.
73. Rules of Procedure, IT/32/Rev. 8, 23 Apr. 1996, rule 70; *id.* at 62-63.
74. Generally, the Statute of the Tribunal precludes trials *in absentia*, but the Appeal Chamber expressly envisaged the possibility, in exceptional cases, of proceedings *in absentia* for contempt where the addressee of a binding order fails to appear in Court, thereby obstructing the administration of justice. Prosecutor v. Tihomir Blaskic, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II, July 18, 1997, Judgement of Oct. 29, 1997, IT-95-14-AR108 bis, para. 59.
75. E.g., in the UK the activities of development/relief NGOs are generally charitable, which brings considerable fiscal benefits. In the case of campaigning NGOs, such as Amnesty International or the Campaign against the Arms Trade, only some, if any, of their activities are considered charitable.
76. The full title is the United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, *reprinted in* ROBERTS & GUELFF, *supra* note 43.
77. Conference of the States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-traps and other Devices (Protocol II) as amended, 35 I.L.M. 1206 (1996).
78. Protocol on Blinding Laser Weapons (Protocol IV), 35 I.L.M. 1218 (1996).
79. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 36 I.L.M. 1507 (1997).
80. In addition to the usual manifestations of a campaign, books were published associated with the campaign. See eg., THE ARMS PROJECT AND PHYSICIANS FOR HUMAN RIGHTS, LAND MINES: A DEADLY LEGACY (1993); ROBERTS & WILLIAMS, AFTER THE GUNS FALL SILENT: THE ENDURING LEGACY OF LAND MINES (1995). The campaign also provoked interest and publications in other quarters. See, e.g., CORNISH, ANTI-PERSONNEL MINES: CONTROLLING THE PLAGUE OF "BUTTERFLIES," (1994); U.S. DEPARTMENT OF STATE, HIDDEN KILLERS - THE GLOBAL LAND MINE CRISIS (1994); THE MILITARY UTILITY OF LAND MINES . . . ? (Smith ed., 1996); Hampson, *The Long Shadow: Land Mines and the Law of Armed Conflicts*, Papers in the Theory and Practice of Human Rights No. 12, Human Rights Centre, University of Essex.
81. One of the significant features of the campaign is the mobilization of medical opinion led by Robin Coupland of the ICRC's Division of Health Operations. This has acquired a momentum of its own and is not confined to the impact on civilians, but is focusing on the nature of the injuries caused by certain weapons. See Coupland, *The Effect of Weapons: Defining Superfluous Injury and Unnecessary Suffering*, 3 MEDICINE AND GLOBAL SURVIVAL, at A1 (1996);



THE SIRUS PROJECT: TOWARDS A DETERMINATION OF WHICH WEAPONS CAUSE "SUPERFLOUS INJURY OR UNNECESSARY SUFFERING" (Coupland ed., 1997).

82. ICRC, *BLINDING WEAPONS: REPORTS OF THE MEETINGS CONVENED BY THE ICRC ON BATTLEFIELD LASER WEAPONS, 1989-1991* (1993); HUMAN RIGHTS WATCH ARMS PROJECT, 7.1 *BLINDING LASER WEAPONS* (1995).

83. Prokosch, *Small Calibre Weapon Systems: Bringing the Dum-Dum Ban up to Date*, Papers in the Theory and Practice of Human Rights No. 11, Human Rights Centre, University of Essex, 1995; Prokosch, *Cluster Weapons*, Papers in the Theory and Practice of Human Rights No. 15, Human Rights Centre, University of Essex, 1995. The development noted in note 82 (i.e., the mobilization of professional medical opinion) may result in limited but effective campaigns on particular weapon use, notably anti-personnel use of incendiary weapons.

84. E.g., EDWARDS & HULME, *supra* note 11.

85. MINEAR *et al.*, *supra* note 34; Benthall, *Disasters, Relief and the Media*, 1993 I.B.

86. Roberts, *supra* note 38, at 82; Gowing, *Real-time Television Coverage of Armed Conflicts and Diplomatic Crises: Does it Pressure or Distort Foreign Policy Decisions?*, Press, Politics and Public Policy Working Papers 94-1, Harvard, 1994. See also Gowing's review of BELL, *IN HARM'S WAY: REFLECTIONS OF A WAR ZONE THUG* (1995), in 6.4 BRIT. JOURNALISM REV. 67 (1995).

87. E.g., the ICRC is organizing a workshop in March 1998 as a practical follow-up to the one referred to in von Flüe, *supra* note 1. The first workshop is seen as having involved general discussion. The second is designed to be more practical and concrete.



# IX

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## The Law of Naval Warfare and International Straits

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WHEN IT COMES TO THE QUESTION OF WHICH RULES of international law apply to international straits in times of naval armed conflict, one has to distinguish between straits bordered by at least one of the parties to an international armed conflict and straits bordered by States that are not directly involved in the hostilities. Although the law of maritime neutrality—let alone the general law of neutrality—is far from settled, the latter situation will, for reasons of convenience, be described as the legal status of neutral straits.<sup>1</sup>

Straits are comparatively narrow natural passageways between one part of the high seas or an exclusive economic zone and another part of the high seas, or exclusive economic zone.<sup>2</sup> Artificial passageways must be distinguished from straits. In particular, they are not governed by the international law applicable to straits, but rather (and if at all) by special treaty provisions. That being so, for the purposes of the present study it is important to note the following provisions.

- With respect to the Panama Canal, the Treaty of 7 September 1977<sup>3</sup> provides that “in time of peace and in time of war it shall remain secure and open to peaceful transit by the vessels of all nations on terms of entire

equality. . . . Vessels of war and auxiliary vessels of all nations shall at all times be entitled to transit the Canal, irrespective of their internal operation, means of propulsion, origin, destination or armament.”<sup>4</sup>

- Pursuant to the Treaty of Constantinople of 29 October 1888,<sup>5</sup> “the Suez maritime canal shall always be free and open, in time of war and in time of peace, to every vessel of commerce or war, without distinction of the flag.”<sup>6</sup>

- Pursuant to Article 380 of the Treaty of Versailles, the Kiel Canal is open to all vessels flying the flags of States not at war with Germany.<sup>7</sup>

### **The Legal Status of Belligerent International Straits**

As far as international straits of the parties to an international armed conflict are concerned, neither those not completely overlapped by territorial sea nor straits governed by “long-standing international conventions,” will be dealt with here in depth.<sup>8</sup> In the case of the former, a route through the high seas or through an exclusive economic zone will usually exist. Hence, littoral States are not bound by the special rules and principles applicable to international straits.<sup>9</sup> In the case of the latter, there is only one international convention explicitly dealing with the situation of a littoral State being party to an ongoing armed conflict.<sup>10</sup> According to Articles 1, 2, 4, and 5 of the 20 July 1936 Montreux Convention, all neutral vessels enjoy the right of transit passage, as long as they travel through the Bosphorus and the Dardanelles by daytime, refrain from supporting Turkey’s enemies, and respect sea lanes designated by the Turkish authorities. However, there is no provision restricting the transit right of Turkish warships. Rather, Article 20 provides:

En temps de guerre, la Turquie étant belligérante, les dispositions des articles 10 à 18 ne seront pas applicables; le passage des bâtiments de guerre sera entièrement laissé à la discretion du Gouvernement turc.

Thus if Turkey is a belligerent the same rules apply as in international straits not governed by a special treaty régime.

***Suspension of the Right of Transit Passage in Time of Armed Conflict?*** The territorial seas of the parties to an international armed conflict are part of the general area of hostilities. Therefore, at first glance there seem to exist no restrictions on the conduct of hostilities in and over international straits completely overlapped by the territorial seas of the parties to an international armed conflict. Indeed, subject to the applicable maritime *jus in bello*, enemy vessels and aircraft in such straits may be attacked, and enemy and neutral

merchant vessels may be visited, stopped, and captured.<sup>11</sup> Of particular note, the littoral State is entitled to deny all enemy vessels and aircraft the right of transit passage.<sup>12</sup> In view of the economic interests involved,<sup>13</sup> however, it is a matter of dispute whether such straits may also be closed to the shipping of States not parties to the conflict, i.e., neutral shipping.<sup>14</sup>

In the course of the deliberations at the 1907 Second Hague Peace Conference on Convention VIII, a proposal by the Netherlands on a comprehensive prohibition of mining international straits was rejected.<sup>15</sup> Another, seeking a prohibition on the complete closing of an international strait by mines, also failed.<sup>16</sup> Therefore, although a number of delegates expressed sympathy for such proposals, Hague Convention VIII lacks any provision on the mining of international straits.<sup>17</sup> During the Second World War, numerous international straits were mined.<sup>18</sup> Yet during the first two years of the war this closure was not complete. In the respective proclamations of danger zones, either peaceful shipping was referred to or piloting services or safe passages were designated, thus enabling peaceful shipping to transit the straits relatively unmolested.<sup>19</sup> Still, in view of the total character of this war in the years following, these examples are insufficient to prove the existence of a prohibition on entirely closing international straits. State practice after 1945 also reveals that if States bordering an international strait are parties to an international armed conflict, they are inclined to close it even to peaceful shipping; they are not prepared to tolerate the dangers otherwise involved.<sup>20</sup>

It seems, however, that a total closure of international straits, especially by naval mines, is inconsistent with the 9 April 1949 judgement of the International Court of Justice in the Corfu Channel case.<sup>21</sup> As is well known, the Court, in view of the state of war alleged by Greece, acknowledged Albania's right to restrict the passage of warships. It emphasized, however, that this may not lead to "prohibiting such passage or subjecting it to requirements of special authorization."<sup>22</sup> Recent state practice also indicates the existence of a rule prohibiting the suspension of the right of transit passage, even during an international armed conflict. At the beginning of the first Gulf War, Iran explicitly acknowledged its legal duty to keep open those parts of the Strait of Hormuz<sup>23</sup> overlapped by its territorial sea.<sup>24</sup> When Iran proclaimed a war zone in that sea area and closed it to international shipping, the international community, because of the overall importance of this strait for international oil trade, reacted with vehement protests.<sup>25</sup> In particular, the United States maintained that the right of transit passage remains unaffected by the fact that the bordering States are involved in an international armed conflict.<sup>26</sup>



These statements and protests imply that the right of transit passage through and over international straits as laid down in Article 38 of the UN Convention on the Law of the Sea (LOS Convention) is both customary in character and binding upon States parties to an international armed conflict.<sup>27</sup> Further evidence in favor of the customary character of a comprehensive and non-suspendable right of transit passage is Article 16, paragraph 4, of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.<sup>28</sup> According to that provision there "shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State." Moreover, it has to be kept in mind that the right of transit passage applies especially to straits that have lost their high seas character because of an expansion of the territorial sea to twelve nautical miles.<sup>29</sup> In all likelihood, without compensation in the form of the right of transit passage, the legal status of international straits would not have been settled.<sup>30</sup> Finally, the *Commander's Handbook of the U.S. Navy* (NWP 1-14M) provides that naval mines may be employed "to channelize neutral shipping, but not in a manner to deny transit passage of international straits [. . .] by such shipping."<sup>31</sup>

On the other hand, it must be remembered that some States neither acknowledge the customary character of Article 38 of the LOS Convention,<sup>32</sup> nor agree with its applicability in times of armed conflict. At the beginning of the deliberations on the Convention, a number of delegations, while pleading for a transit right for vessels in international straits, were hesitant to accept a right of overflight as well.<sup>33</sup> In contrast to NWP 1-14M, the German Handbook, in section 1042 on mining, provides that "the shipping lanes of neutral and non-belligerent States shall be kept open to an appropriate extent, if military circumstances so permit."<sup>34</sup> This view is obviously shared by Denmark.<sup>35</sup>

It follows from the foregoing that State practice is conclusive only to the extent that, in principle, neutral vessels, i.e., warships and merchant vessels,<sup>36</sup> may not be denied the right of transit passage (or of non-suspendable innocent passage) in international straits belonging to the parties to an international armed conflict.<sup>37</sup> However, there is also a tendency towards restriction of this right.<sup>38</sup> Unfortunately, it is far from clear under which conditions the littoral belligerent State should be allowed to so restrict it. Of course, one possibility is denial to neutral submarines of the right to transit a belligerent strait submerged.<sup>39</sup> This restriction could be justified by the legitimate interest of the belligerent littoral States in being fully informed of sea traffic in its coastal waters. The interests of the neutral flag States would be infringed upon only insignificantly, especially in view of the technical difficulties of identifying submerged objects.<sup>40</sup> Still, because of its inconclusiveness,

no further conclusions relating to restrictions on the neutral States' right of transit passage can be drawn from State practice. In any event, the reasons justifying any limitation of this right must be of considerable weight—for example, overwhelming considerations of national security.<sup>41</sup> This follows from the fact that the law of both naval warfare and maritime neutrality has to be considered to be of an exceptional legal order.<sup>42</sup>

**The Right of Overflight.** The foregoing principles cannot, as such, be applied to the right of overflight that Article 38.1 of the LOS Convention includes in transit passage.<sup>43</sup> While NWP 1-14M contains a prohibition of entirely mining international straits, no provision addresses closure of the airspace above an international strait.<sup>44</sup> Of course, enemy military aircraft entering the airspace above an international strait overlapped by the belligerent coastal State's territorial sea may be attacked, and enemy civilian aircraft may be forced to land and be subjected to capture.<sup>45</sup> In principle, neutral aircraft are entitled to continue with their normal operations, but if they enter that airspace they do so at their own risk.<sup>46</sup> Still, an unlimited application of the peacetime rules on overflight in time of armed conflict would meet considerable practical difficulties. Aircraft move much faster than ships. The *Vincennes* incident is but one demonstration of the difficulties involved in the identification of aircraft within a limited period of time.<sup>47</sup> In view of the potential threat posed by aircraft, parties to an international armed conflict will hardly be willing to allow neutral air traffic to continue using the airspace above their international straits. Hence, there seem to be good reasons for a belligerent right to restrict or even suspend the right of overflight by neutral air traffic in the airspace above international straits in time of armed conflict. Indeed, in State practice there are some indications that during an international armed conflict coastal States reserve a right to close entirely the airspace above international straits overlapped by their territorial seas.<sup>48</sup> This practice, however, is not sufficient to prove either the nonexistence or existence of an unlimited right of overflight by neutral aircraft in time of armed conflict. Therefore, the legality of a restriction of transit passage by neutral aircraft can only be judged, if it can be judged at all, *ex post* in light of the *jus ad bellum*.

### The Legal Status of Neutral International Straits

#### *Neutral International Straits to Which the Right of Transit Passage Applies.*

*The Second Hague Peace Conference.* The legal status of neutral international straits was dealt with at the Second Hague Peace Conference, in the context of



the rights and duties of neutral States in naval war. In 1894, the Institut de Droit International had proposed a rule according to which "les détroits qui servent de passage d'une mer libre à une autre mer libre, ne peuvent jamais être fermés." The Swedish delegate to the Second Hague Peace Conference referred to that proposal in these terms: "Si le droit des neutres d'interdire l'accès de ses eaux territoriales aux navires de guerre et aux prises est consacré comme le porte la proposition britannique article 30, il faudrait ajouter à cette disposition une exception du même contenu que la résolution de l'Institut."<sup>49</sup> The Danish delegate proposed an amendment by which the provisions of Hague Convention XIII were not to be understood "de façon à prohiber en temps de guerre le passage simple des eaux neutres, unissant deux mers libres par un navire de guerre ou navire auxiliaire d'un belligérant."<sup>50</sup> Both proposals were aimed at denying neutral States the right to close their territorial seas if they formed part of an international strait. The contrary view was taken by the Ottoman and Japanese delegates, who wanted to treat international straits in the same manner as other coastal waters.<sup>51</sup> In the end, the legal status of neutral international straits remained unsettled, even though the Third Committee in its report to the plenary had come to the conclusion that "la formule adoptée . . . ne tranche nullement les questions précédentes, laissées sous l'empire du droit des gens général."<sup>52</sup> Still, it is doubtful that by 1907 a rule to that effect was in existence.<sup>53</sup> Although only Japan had explicitly rejected a prohibition on closing neutral international straits, the lack of willingness amongst the other delegates to agree upon a special provision on straits cannot be ignored.<sup>54</sup>

*State Practice.* State practice during international armed conflicts before 1945 was also inconclusive with regard to the existence of a general and comprehensive legal duty of neutral States to keep their international straits open.<sup>55</sup> Only the Scandinavian States allowed belligerent merchant vessels and warships to transit their international straits and, if they had laid mines there, offered piloting services.<sup>56</sup> In addition, Denmark, Finland, Iceland, Norway, and Sweden, in the Stockholm Declaration Regarding Similar Rules of Neutrality of 27 May 1938,<sup>57</sup> promised to keep their international straits open to belligerent warships.<sup>58</sup> These examples are insufficient to prove the existence of a customary rule.<sup>59</sup> On the contrary, other States, like Germany, believed that there existed no rule of customary or treaty law obliging neutral States to let belligerent merchant vessels freely transit neutral international straits.<sup>60</sup>

Relevant state practice since 1945 is also predominantly restricted to Scandinavian States,<sup>61</sup> which, by acts of national legislation, have more or less



clearly shown their willingness to keep their international straits open for belligerent warships, merchant vessels, and aircraft.<sup>62</sup> Some authors claim the existence of a general rule of customary law to that effect.<sup>63</sup> Unfortunately, they ignore the fact that such a claim must be based on a general practice accompanied by a corresponding *opinio juris*. Moreover, the question of whether the transit of belligerent warships is in accordance with the neutral status of the littoral State has to be clearly distinguished from that of whether a neutral State is entitled to deny transit through or over its international strait to belligerent warships, merchant vessels, or aircraft. Therefore, despite assertions to the contrary, one must conclude that until the end of the Third United Nations Conference on the Law of the Sea (UNCLOS III) in 1982, there existed no customary rule prohibiting the total closure of international straits by neutral coastal States.

*The Influence of the International Law of the Sea.* So far, we have not taken into consideration the progressive development of the international law on international straits initiated by the codifications of the law of the sea, especially by the LOS Convention. As already mentioned, Article 16.4 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone provides that there “shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.”<sup>64</sup> Since it was up to the coastal State to determine the innocence of passage, the question arose of whether it was entitled to require foreign warships to leave the strait should they fail to comply with the laws and regulations of the coastal State. Other unresolved issues include the right of submarines to transit straits submerged and the duty of foreign military aircraft to obtain prior admittance from the coastal State for overflight.<sup>65</sup>

These problems were partly solved by UNCLOS III, especially because extension of the territorial sea to twelve nautical miles did not allow the issue of international straits to be left unregulated.<sup>66</sup> Now the right of transit passage applies in international straits that are overlapped by the territorial seas of the littoral States.<sup>67</sup> According to Article 38.2 of the LOS Convention, transit passage that “shall not be impeded”<sup>68</sup> is “the exercise of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait.” While exercising the right of transit passage, ships and aircraft must proceed without delay; refrain from any threat or use of force against the sovereignty, territorial integrity, or political independence of the bordering State, or in any other manner violate the principles of international law embodied in the United Nations Charter; and limit activities to those

incident to their normal modes of continuous and expeditious transit, unless rendered necessary by *force majeure* or by distress.<sup>69</sup> Moreover, according to Article 39.2, ships in transit shall comply with "generally accepted international regulations, procedures and practices" for safety at sea and for the prevention, reduction, and control of pollution from ships. This means that they are obliged to observe the conventions concluded under the auspices of the International Maritime Organization (IMO).<sup>70</sup> Aircraft in transit passage shall observe the Rules of the Air established by the International Civil Aviation Organization (ICAO).<sup>71</sup> Finally, the littoral State is entitled to designate sea lanes and to prescribe traffic separation schemes.<sup>72</sup> However, such laws and regulations shall not discriminate in form or in fact among foreign ships, or in their application have the practical effect of denying or impairing the right of transit passage.<sup>73</sup> This implies that the right of transit passage will remain unaffected, even if the vessel or aircraft in transit passage violates the regulations adopted by the littoral State.<sup>74</sup>

In view of the customary character of these provisions, we may draw the conclusion that warships and military aircraft enjoy an unimpeded right of transit passage.<sup>75</sup> Submarines, because of the reference to "normal modes" in Article 39.1(c), may transit international straits submerged.<sup>76</sup> The littoral States' duty not to infringe upon this right is incumbent on them not only in time of peace but also during an international armed conflict at sea if they are not parties.<sup>77</sup> If the parties to an international armed conflict may restrict or suspend the right of transit passage only in exceptional cases, then, *a fortiori*, States not parties to the conflict must be subject to even stricter limitations.

This conclusion is verified by recent State practice. During the Iran-Iraq conflict, transit through or over the Strait of Hormuz by the Iranian and the Iraqi armed forces was in no way restricted by Oman. The military manuals of the U.S. Navy,<sup>78</sup> Canada,<sup>79</sup> and the Federal Republic of Germany<sup>80</sup> also provide that neutral States are not entitled to restrict or suspend the transit of belligerent warships and military aircraft, or to submit them to stricter regulations than those applicable to vessels and aircraft of other States.<sup>81</sup> Moreover, the continuing validity of the right of transit passage is an appropriate means to meet the object and purpose of the law of neutrality.<sup>82</sup> Hence, Rauch correctly states:

One of the advantages of the new transit passage concept is that it keeps the littoral States bordering straits with great strategic value out of the vicious circle of escalation in times of tension and crisis. If transit through such straits were subject to the discretion of the coastal States, they would unavoidably become involved, even if the discretionary power were to be exercised evenhandedly, i.e.,



even if they meticulously abided by the rule that all restrictions or prohibitions have to be applied impartially to the belligerents. The ramifications of a refusal or of a permission of transit in whole or in part—e.g., only surface navigation, or surface and submerged navigation, or navigation and overflight—could, albeit legally non-discriminatory, in fact be of quite different military and strategic value to the parties to the conflict.<sup>83</sup>

As in time of peace, however, belligerent warships in transit must properly respect designated sea lanes and traffic separation schemes and must proceed without delay.<sup>84</sup> They may not carry out any research or survey activities without the prior authorization of the bordering States.<sup>85</sup> The prohibition on the threat or use of force against the littoral State is complemented by the relevant prohibitions of the law of maritime neutrality as laid down in the 1907 Hague Convention XIII and as found in customary law.<sup>86</sup> In particular, belligerent warships and military aircraft may neither take hostile actions nor use these sea areas as a base of operations.<sup>87</sup> Military aircraft must respect safety regulations and have due regard for the safety of air traffic.<sup>88</sup> In view of their sovereign immunity, belligerent warships are not bound by the provisions of the LOS Convention on the protection of the marine environment.

While submarines may pass through neutral international straits submerged, it is not quite clear which additional measures belligerent warships and military aircraft in transit may take.<sup>89</sup> According to the Canadian Draft Manual, they may transit a neutral strait “in an appropriate state of readiness with appropriate sensors activated.”<sup>90</sup> NWP 1-14M provides that “belligerent forces in transit may, however, take defensive measures consistent with their security, including the launching and recovery of aircraft, screen formation steaming, and acoustic and electronic surveillance.”<sup>91</sup> Military aircraft may “engage in activities that are consistent with their security and the security of accompanying surface and subsurface forces.”<sup>92</sup> The same rules can be found in the *San Remo Manual*.<sup>93</sup> The use of acoustic and electronic sensors must be considered a normal activity of warships and military aircraft, especially during armed conflict, an activity that is not to be equated with “research and survey activities” in the sense of Article 40 of the LOS Convention. Otherwise, their security would be intolerably jeopardized.<sup>94</sup>

There remain some doubts as to whether the other measures mentioned in section 7.3.5 of NWP 1-14M are compatible with the duty of continuous and expeditious transit.<sup>95</sup> Since there is no relevant State practice that would allow conclusions regarding the current state of the law, one cannot but consider such activities as in accordance with the applicable law if they do not: (1) endanger the safety of navigation within the strait; (2) present a threat or



use of force against the sovereignty, territorial integrity, or political independence of the neutral littoral State in a way incompatible with the laws of neutrality; or (3) unreasonably exceed what is necessary for a continuous and expeditious transit.<sup>96</sup> As regards the use of military aircraft, this may not result in a use of neutral waters or airspace as a base of operations. Thus, attacks may not be conducted by military aircraft launched from warships within neutral international straits.<sup>97</sup> Within and over neutral territorial seas, all hostile actions by belligerent forces are prohibited. The fact that parts of a neutral's territorial sea form an international strait does not alter anything. The right of transit passage implies only that the neutral littoral State is prohibited from closing an international strait to belligerent warships and military aircraft; it does not mean that the coastal State's sovereignty is no longer protected.

It needs to be emphasized that the foregoing principles only apply to offensive operations. As seen, according to NWP 1-14M and the San Remo Manual "defensive measures consistent with their security" would not be contrary to the inviolability of the neutral State's sovereignty. During the discussions on the San Remo Manual there "seemed to be general agreement that because of the dangers of unlawful attack on a transiting unit by an opposing belligerent which might ignore its duty to respect the neutrality of the State bordering the strait, . . . the transiting unit should be allowed to go through in a high state of readiness and should be able to adopt the defensive measures necessary for the self-defence of the unit or force."<sup>98</sup>

Unfortunately, the participants were unable to be more concrete about this issue. There is, however, another rule in the San Remo Manual that is of help in evaluating the legality of defensive measures taken in neutral waters, including neutral international straits. Paragraph 22 provides:

Should a belligerent State be in violation of the regime of neutral waters . . . the neutral State is under an obligation to take the measures necessary to terminate the violation. If the neutral State fails to terminate the violation of its neutral waters by a belligerent, the opposing belligerent must so notify the neutral State and give the neutral State a reasonable time to terminate the violation by the belligerent. If the violation of the neutrality of the State by the belligerent constitutes a serious and immediate threat to the security of the opposing belligerent and the violation is not terminated, then that belligerent may, in the absence of any feasible and timely alternative, use such force as is strictly necessary to respond to the threat posed by the violation.

Accordingly, belligerent warships and military aircraft transiting a neutral international strait are allowed to take all measures necessary for self-defense

as acknowledged by customary international law if the neutral littoral State is either unwilling or unable to terminate the violation of its neutrality. Thus, the sovereignty of the neutral State and the belligerents' interests are equally met.

***Neutral International Straits to Which the Right of Transit Passage Does Not Apply.*** The rules and principles dealt with so far undoubtedly apply to international straits overlapped by the territorial seas of neutral coastal States. However, according to the LOS Convention the right of transit passage is not valid in all straits which—either in general or in specific maritime parlance—are used for international navigation. The exceptions have repercussions for the law of maritime neutrality, because they concern sea areas covered by the territorial sovereignty of the neutral coastal State.

*Exceptions to the Right of Transit Passage According to the LOS Convention.* Straits used for international navigation between a part of the high seas or an exclusive economic zone and the territorial sea or historical bay of a foreign State are governed only by the right of innocent passage.<sup>100</sup> Although according to Article 45.2 of the LOS Convention there “shall be no suspension of innocent passage through such straits,” the coastal State will be in a position to impose stricter limitations on international navigation than if the transit passage régime applied. The decisive differences are that foreign submarines may not transit such straits submerged and that foreign aircraft are prohibited from entering the airspace above them, unless the coastal State explicitly consents.

Another explicit exception to the transit passage régime is laid down in Article 36 of the LOS Convention; it applies “if there exists through the strait a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.” If an international strait is not—at least in part—completely overlapped by the territorial sea of the coastal States, ships and aircraft of all nations enjoy freedom of navigation and overflight in the remaining corridor even if an exclusive economic zone has been proclaimed. Such a situation is encountered in all straits whose breadth exceeds twenty-four nautical miles measured from properly drawn baselines. In straits whose breadth is less than twenty-four nautical miles there may also exist a high seas (or EEZ) corridor if the coastal States claim a territorial sea of less than twelve nautical miles.<sup>101</sup> Within those portions of the strait that are part of the coastal State's territorial sea, ships and aircraft only enjoy a *suspendable* right of innocent passage.<sup>102</sup>

At first glance, the provisions of Article 36 seem rather clear. However, their practical application sometimes poses difficult problems. It needs to be



emphasized that the existence of a high seas or EEZ corridor as such does not exclude the applicability of the transit passage régime. The route must be "of similar convenience with respect to navigational and hydrographical characteristics." If the remaining corridor does not meet these qualifications, the transit passage régime will also apply in straits not overlapped by the territorial sea of the bordering State.<sup>103</sup> But when is the corridor "of similar convenience"? In view of the wording of Article 36, this will not be the case if the navigational channel is not identical with the remaining corridor or when transiting through the corridor would result in navigational difficulties or a loss of time.<sup>104</sup>

The latter aspect is also of importance with regard to overflight. If the corridor, due to the geographic configuration of the bordering coastlines, often changes its direction, military aircraft in particular will hardly be able to follow it exactly. This problem is not resolved by demanding that pilots decelerate, because, should they do so, their aircraft would be more vulnerable to surface to air missiles. Hence, the coastal State will have to tolerate flights over those parts of the strait overlapped by its territorial sea.<sup>105</sup>

Of course, some will counter these arguments by denying a neutral State's duty to have regard for belligerent military considerations. The neutral coastal State is, they would argue, obliged to tolerate transit through and over its territorial sea only if necessary for the safety of international air and sea traffic. If a belligerent is not prepared to assume the risks resulting, e.g., from slow flight, it must simply refrain from using the neutral airspace. The counterarguments have some validity in time of peace. Although the relationship between belligerents and neutrals is to a considerable extent governed by the law of peace, the modification thereof by the laws of neutrality may not be ignored. The object and purpose of the law of neutrality is to protect the neutral against the effects of hostilities and to prevent it from becoming (directly) involved in the armed conflict. The parties to the conflict will scarcely be willing to limit their operations to corridors that are not of "similar convenience." The neutral State would be obliged to react, possibly by military means, to the use of its airspace. Of course, there remains no specific rule of maritime neutrality which would permit belligerent aircraft to overfly neutral territorial seas in those international straits through which there are high seas or exclusive economic zone routes of similar convenience as defined by Article 36. However, functional considerations seem to justify the conclusion that belligerent warships and military aircraft are entitled to transit such straits in and over the neutral coastal State's territorial sea.<sup>106</sup>



The third kind of strait excluded from the application of the régime of transit passage is dealt with in Article 38.1 of the LOS Convention. This exception, generally called the Messina Exception because it has its origin in a corresponding endeavour by Italy, applies to a strait that "is formed by an island of a State bordering the strait and its mainland."<sup>107</sup> In such a case, transit passage shall not apply "if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics."<sup>108</sup> However, according to Article 45 all ships enjoy the right of innocent passage in such straits. Although States bordering a strait like that of Messina will regularly try to exclude the right of transit passage, they will be entitled to do so only if the conditions laid down in Article 38.1 are met.<sup>109</sup> For example, even in the Strait of Messina there is no unlimited right to prevent ships and aircraft from transiting.<sup>110</sup> Otherwise, ships and aircraft travelling from France to the southern and southeastern Mediterranean would be compelled to take the route around Sicily, which is about sixty nautical miles longer than the passage through the Strait of Messina. It can hardly be said that that route is of "similar convenience."

*Straits Governed by Long-Standing International Conventions.* Finally—and this is a continuing cause for dispute—according to Article 35(c) of the LOS Convention the régime of transit passage does not apply to straits "in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits."<sup>111</sup> There is no indication in the Convention as to which straits qualify for this exception. Still, according to the view taken here, only six international straits, if any at all, are regulated by such conventions:<sup>112</sup> the Turkish Straits (Bosporus and Dardanelles), the Strait of Magellan, the Strait of Gibraltar, the Sound and the Belts, and the Åland Islands Strait.<sup>113</sup>

It is beyond any doubt that in the Turkish Straits the right of transit passage does not apply,<sup>114</sup> for there are specific rules with regard to transit passage in the Montreux Convention of 20 July 1936.<sup>115</sup> In time of peace and in time of war, merchant vessels of all nations enjoy an unrestricted right of passage through the Dardanelles, the Marmara Sea, and the Bosporus.<sup>116</sup> Article 23 limits the right of overflight to civil aircraft. Accordingly, military aircraft may not enter airspace above the Straits, either in time of peace or war.

Special provisions apply to warships; further, the Convention distinguishes between warships belonging to States bordering the Turkish Straits and those belonging to other States.<sup>117</sup> In principle, all warships are obliged to inform the Turkish authorities in advance, by notification of the names, types, and

numbers of the ships and of the date of passage.<sup>118</sup> Prior to passage the commander must also provide information about the nature of weapons aboard his ship. No more than nine ships may transit the Straits simultaneously. The aggregate tonnage of the ships may not exceed fifteen thousand tons unless they belong to a State bordering the Straits. If they exceed fifteen thousand tons, the ships may only transit alone or in the company of two cruisers (or destroyers). The total tonnage of warships in the Black Sea belonging to States not bordering that sea may amount to thirty thousand tons (or, in the event of significant disparity between fleets, a maximum of forty-five thousand tons). All warships transiting the Straits are prohibited from launching their aircraft. Submarines may not transit, unless they belong to bordering States and originate from areas beyond the Black Sea. Such submarines may only transit alone, during the day, and on the surface. Laid down in Articles 10 through 18, these provisions on warships apply both in time of peace and, if Turkey is not a belligerent, in time of war.<sup>119</sup> Warships belonging to the parties to an international armed conflict are strictly prohibited from transiting the Turkish Straits.<sup>120</sup>

While the Turkish Straits do indeed match the conditions laid down in Article 35(c) of the LOS Convention, the other straits mentioned do not; however, they clearly qualify as being governed by "long-standing international conventions" in the sense of that provision. Freedom of navigation in the Strait of Magellan is dealt with in the Boundary Treaty between Argentina and Chile of 23 July 1881.<sup>121</sup> That treaty was concluded due to an arbitral award by Edward VII. According to Article V, the Strait of Magellan is permanently neutralized, and ships of all nations enjoy an unrestricted right of freedom of navigation. In Article 10 of the Treaty of Peace and Amity of 18 October 1984, Argentina and Chile, explicitly referring to the treaty of 1881, agreed in as follows:<sup>122</sup>

The delimitation herein agreed in no way alters what is laid down in the Boundary Treaty of 1881, whereby the Strait of Magellan is neutralized in perpetuity and unrestricted navigation in it is assured for the flags of all nations. . . .

Since there is no provision in these treaties specifically regulating "passage," some argue that Article 35(c) is not applicable and that therefore the Magellan Strait is governed by the right of transit passage.<sup>123</sup> However, the missing reference to "passage" should not be overestimated. Rather, "navigation" is to be understood as comprising passage.<sup>124</sup> This is one of the reasons why, for example, the United States acknowledges that the Strait of Magellan falls



under the 35(c) exception.<sup>125</sup> Thus, according to the Treaty of 1881 (not Article 38 of the LOS Convention), warships and merchant vessels of all nations enjoy an unlimited right of passage through the Strait of Magellan at all times.

Since there is no reference to aircraft in either the 1881 or 1984 treaties, it is a matter of contention whether aircraft of all nations also enjoy the right of non-suspendable overflight. Although Argentina and Chile are seemingly unwilling to accept such a right, in light of long-standing practice a rule of customary law to that effect has evolved.<sup>126</sup> Therefore, it may be concluded that although the régime of transit passage as such does not apply to the Strait of Magellan, ships (according to the Treaty of 1881) and aircraft (according to customary law) of all nations enjoy the right of non-suspendable passage and overflight.

As regards the Strait of Gibraltar, the passage of ships is subject to agreements between France, Spain, and the United Kingdom of 1904, 1907, and 1912.<sup>127</sup> There is, however, no indication in those treaties that the parties also intended either to guarantee or exclude passage by ships of third States.<sup>128</sup> When they were concluded, the high seas, including the high seas corridor between Gibraltar and North Africa, could not be made subject to bilateral or multilateral international treaties. Nevertheless, Spain has repeatedly maintained that the Strait of Gibraltar is regulated by the Declaration of 1904 and is therefore exempted from at least the right of overflight.<sup>129</sup> It is interesting to note that during the Yom Kippur War (1973), U.S. military aircraft on flights from the Azores to Israel scrupulously kept to the airspace above the high seas corridor between the former three-nautical-mile territorial seas of Spain and Morocco.<sup>130</sup> In 1973, however, the régime of transit passage was still unknown. Four years after the adoption of the LOS Convention, U.S. military aircraft launched from Britain to attack targets in Libya flew over the Strait of Gibraltar. The United States justified the overflight based on the Convention's right of transit passage.<sup>131</sup> Hence, neither the treaties referred to nor State practice allows the conclusion that the Strait of Gibraltar is a strait within the meaning of Article 35(c).<sup>132</sup> So far, only Spain has taken a view to the contrary. Since it did not protest the 1986 overflight by U.S. military aircraft, the Spanish position has no influence on the legal characterization of the Strait of Gibraltar.

With respect to passage through the Baltic Straits (Sound, Great and Little Belt), it may be doubted here too whether it is regulated by "long-standing international conventions." Denmark has repeatedly referred to the Treaty on the Redemption of Sound Dues of 14 March 1857<sup>133</sup> and to the U.S.-Danish Treaty of 1 April 1857<sup>134</sup> to maintain that those straits are not governed by



Article 34 ff. of the LOS Convention.<sup>135</sup> Accordingly, by the Ordinance of 27 February 1976 Denmark has subjected transit by warships and overflight by military aircraft to prior notice and prior admittance respectively. While in principle all States observe these regulations,<sup>136</sup> they have emphasized that the 1857 treaties were never applied to warships.<sup>137</sup> Rauch takes the position that passage in the Baltic Straits is not regulated, either in whole or in part, by the treaty of 14 March 1857. He therefore maintains that the straits are governed by the right of transit passage in accordance with Part III of the LOS Convention.<sup>138</sup> Indeed, the Treaty on the Redemption of Sound Dues contains only an indirect reference to the customary freedom of navigation. On the other hand, in the U.S.-Danish Treaty of 1 April 1857 "the free and unencumbered navigation of American vessels, through the Sound and the Belts forever" is guaranteed. Ultimately, there is little need for a final solution to this problem, since such a solution would not clarify a situation in which Denmark was neutral. Even if one were prepared to characterize the Danish Straits as regulated by "long-standing conventions," doing so would not necessarily imply that a neutral Denmark would be entitled to close them to belligerent warships and military aircraft. Instead, the practice of Scandinavian States already referred to above justifies the assumption that Denmark will keep its straits open in the event of neutrality.<sup>139</sup> As regards Sweden and transit through the Øresund, that assumption is strengthened by the Swedish Ordinance of 17 June 1982, which expressly excludes warships and military aircraft from the right of transit passage restrictions.<sup>140</sup> This means that Sweden, although considering the Øresund a historical strait,<sup>141</sup> acknowledges the continuing validity of the right of passage and overflight by belligerent warships and military aircraft in naval armed conflict. Hence, the Danish restrictions on passage and overflight do not apply when the bordering States are neutrals.

Finally, Sweden<sup>142</sup> and Finland<sup>143</sup> maintain that the Åland Islands Strait, in light of the 3 March 1918 Treaty of Brest-Litovsk and the 20 October 1921 Treaty Concerning the Non-Fortification and Neutralization of the Åland Islands, is excluded from the régime of transit passage laid down in Part III of the LOS Convention. Indeed, according to Article 5 of the 1921 treaty the right of passage is not restricted but is, instead, subject to the rules of international law and to international practice. The question, therefore, is whether a specific regulation of passage exists. In that regard, Rauch takes the following position:

Unless one is to throw overboard all rules of treaty interpretation as codified in the Vienna Convention on the Law of Treaties, however, it is impossible to

construe Art. 5 of the Åland Convention as a treaty provision "regulating" passage through that strait.<sup>144</sup>

Obviously, Rauch is in favor of a very narrow understanding of the notion "regulated" in Article 35(c) of the LOS Convention, since he is prepared to accept only explicit restrictions or prohibitions. This notion, however, need not necessarily be understood so restrictively. It may well suffice that the provisions in question deal with passage at all. Hence, there are good reasons to maintain that passage through the Åland Straits is free only to the extent commonly understood in 1921. Thus, ships of all nations enjoy the right of passage, whereas aircraft are not entitled to overflight. Still, the Åland Straits may not be completely excluded from the régime of transit passage. In the treaty of 1921 the breadth of the territorial sea is fixed at three nautical miles. Since that treaty is still in force and has not been modified, a right of transit passage at least exists in the sea areas beyond the three-nautical-mile territorial seas.

### Conclusion

Practice with regard to international straits has shown that States bordering an international strait have continuously endeavored to assimilate the sea areas concerned into their territorial sea or even internal waters. The majority of these endeavors are inconsistent with the legal regime of international straits as it has been developed by State practice and especially by the United Nations Convention on the Law of the Sea. In and over international straits a right of transit passage exists that shall not be impeded, whether in time of peace or armed conflict. Of course, a belligerent is not obliged to leave unmolested enemy vessels and aircraft transiting a strait overlapped by its territorial sea. Neutral shipping and neutral aircraft, however, continue to enjoy the right of transit passage. Neutral States bordering an international strait may prescribe and enforce only regulations that are in conformity with the respective provisions of Part III of the LOS Convention. Moreover, they are obliged to counter any abuse of the neutral status of the respective waters by any of the belligerents. They may, however, neither suspend nor in any other manner impede the right of transit passage, even though observing the principle of impartiality.

Of course, the law of maritime neutrality is far from settled. However, as regards the legal status of neutral international straits, it is here maintained that there exists a consensus adequately balancing the interests involved: neutral States are protected from the adverse effects of the hostilities, and



belligerents continue to enjoy the degree of mobility that is essential for the success of their naval operations. In order to preserve that compromise it is necessary to counter any effort aimed at a further restriction of the freedom of navigation and overflight in and over international straits. Since international straits are highly important traffic ways, every interested State should, starting in time of peace, take all feasible measures in accordance with international law to prevent any infringement of the legal regime of those sea areas. It may be emphasized that to secure effectively the international legal status of international straits it is in no way sufficient merely to rely upon one "lead nation." Rather, all States concerned must, individually and collectively, take the steps necessary.

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Notes

1. Presently, the law of maritime neutrality is under scrutiny by a committee of the International Law Association. However, the discussions have revealed that there only is a fairly narrow basis for consensus.

2. See the definition in United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 37, U.N. Doc. A/CONF.62/122, reprinted in 21 I.L.M. 1261 [hereinafter LOS Convention]. See also Convention on the Territorial Sea and the Contiguous Zone, Apr. 19, 1958, art. 16(4), 15 U.S.T. 1606, 516 U.N.T.S. 205. In the Corfu Channel Case, the International Court of Justice characterized the respective sea area as an international strait because of "its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation." 1949 I.C.J. Rep. 4, 23.

3. 33 U.S.T. 1, T.I.A.S. No. 10,029, reprinted in 16 I.L.M. 1082 (1977).

4. For an older effort to suspend the right of passage through the Panama Canal by way of an extensive interpretation of "defence," see Padelford, *Neutrality, Belligerency, and the Panama Canal*, 35 AM. J. INT'L L. 55 (1941).

5. Reprinted in 3 AM. J. INT'L L. (Supp.) 123 (1909).

6. For a general overview, see Roussos, *Le principe de la liberté de passage du Canal de Suez et l'application des règles du droit de la guerre maritime*, 1 REVUE DE DROIT INTERNATIONAL POUR LE MOYEN-ORIENT 151 (1951/52). On the illegality of Egyptian interference with Israeli and neutral shipping, see UN Security Council Resolution 95 of 1 September 1951, U.N. Doc. S/2298/Rev. 1, and Gross, *Passage through the Suez Canal of Israel-Bound Cargo and Israeli Ships*, 51 AM. J. INT'L L. 530 (1957).

7. Note that on 14 November 1936 the German government had denounced arts. 380 ff. Hence, according to a widely held view the Kiel Canal is no longer governed by the relevant provisions of the Treaty of Versailles.

8. LOS Convention, *supra* note 2, art. 35(c).

9. Accordingly, the U.S. Navy's *Commander's Handbook on the Law of Naval Operations* provides:

Ships and aircraft transiting through or above straits used for international navigation which are not completely overlapped by territorial seas and through which there is a high seas or exclusive economic zone corridor suitable for such navigation, enjoy the high seas freedoms of navigation and overflight while operating in and over such a corridor.



Accordingly, so long as they remain beyond the territorial sea, all ships and aircraft of all nations have the unencumbered right to navigate through and over such waters subject only to due regard for the right of others to do so as well.

U.S. NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (NWP 1-14M), § 2.3.3.2 (1995) [hereinafter NWP 1-14M].

10. The legal régime of straits in which passage is regulated in whole or in part by long-standing international conventions specifically relating to such straits will be dealt with in the context of neutral straits.

11. RAUCH, THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS FOR THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS AND THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: REPERCUSSIONS ON THE LAW OF NAVAL WARFARE 44 (1984); Ronzitti, *The Crisis of the Traditional Law Regulating International Armed Conflicts at Sea and the Need for Its Revision*, in THE LAW OF NAVAL WARFARE 20 (Ronzitti ed., 1988); DONNER, DIE NEUTRALE HANDELSSCHIFFFAHRT IN BEGRENZTEN MILITÄRISCHEN KONFLIKT 143 (1993); Baxter, *Passage of Ships through International Waterways in Time of War*, 31 BRIT. Y.B. INT'L L. 189, 202 (1954); Bothe, *Neutrality in Naval Warfare*, in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD—ESSAYS IN HONOUR OF FRITZ KALSHOVEN 403 (Delissen & Tanja eds., 1991); MÜNCH, DIE RÉGIME INTERNATIONALER MEERENGEN VOR DEM HINTERGRUND DER DRITTEN UN-SEERECHTSKONFERENZ 44 (1982). For a contrary view *de lege ferenda*, see Harlow, *UNCLOS III and Conflict Management in Straits*, 15 OCEAN DEV. & INT'L L.J. 197, 206 (1985).

12. In 1951, during the Israeli-Arab conflict, Egypt prohibited passage through the Strait of Tiran by all enemy warships. Enemy merchant vessels were subject to capture. On 23 May 1967 President Gamal Abdel Nasser declared the Strait of Tiran closed to all Israeli shipping: "The Aqaba Gulf constitutes our Egyptian territorial waters. Under no circumstances will we allow the Israeli flag to pass through the Aqaba Gulf." 6 I.L.M. 516 (1967). See also Gross, *Passage through the Strait of Tiran and in the Gulf of Aqaba*, 3 LAW & CONTEMP. PROBS. 125 (1968); Hammand, *The Right of Passage in the Gulf of Aqaba*, 15 REVUE EGYPT. DE DROIT INTERNATIONAL (1959). During the Iran-Iraq conflict, those parts of the Strait of Hormuz overlapped by the Iranian territorial sea were closed to Iraqi shipping. See Amin, *The Iran-Iraq War: Legal Implications*, 6 MARINE POL'Y 193, 209 (1982).

13. For the importance attached to the freedom of navigation in international straits, see U.N. DEPT OF DISARMAMENT AFFAIRS, THE NAVAL ARMS RACE 49, 68 ff. (1986); Alexander, *International Straits*, in THE LAW OF NAVAL OPERATIONS, 91, 101 ff. (Robertson ed., 1991).

14. For an older, detailed analysis, see Baxter, 31 BRIT. Y.B. INT'L L. 202 ff. (1954). As already mentioned, this question does not arise with respect to international straits not governed by the right of transit passage, i.e., straits "in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits" [LOS Convention, *supra* note 2, art. 35(c)], "if there exists through the strait a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics" (*Id.*, art. 36), or "if the strait is formed by an island of a State bordering the strait and its mainland . . . and if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics" [*Id.*, art. 38.1)]. According to Article 45 of the LOS Convention, in international straits in the sense of Article 38.1, a non-suspendable right of innocent passage exists; in straits in the sense of Article 36, a suspendable right of innocent

passage exists. (*Id.*, art. 45). See also ROBERTSON, *THE "NEW" LAW OF THE SEA*, 38 ff. (Newport Paper #3, Naval War College, 1992); RAUCH, *supra* note 11, at 38 ff.

15. Article 4 of the Netherlands proposal reads, "En tout cas les détroits, qui unissent deux mers libres ne peuvent pas être barrés." Reprinted in NIEMEYER, *URKUNDENBUCH ZUM SEEKRIEGSRECHT* 47 (1913). For the English translation, see III *THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: THE CONFERENCE OF 1907*, at 663 (Scott ed., 1921). See also the references in LEVIE, *MINE WARFARE AT SEA* 42 ff. (1992).

16. See Article 6 (Réservé) of the *Texte d'un Projet de Règlement arrêté sur la base des Délibérations du Comité d'Examen*: "La communication entre deux mers libres ne peut être barrée entièrement par des mines automatiques de contact. Mais le passage pourra y être soumis à conditions qui seront décrétées par les autorités compétentes." Reprinted in NIEMEYER, *supra* note 15, at 744; see also Scott, *supra* note 15, at 674.

17. In its report to the plenary, the Third Committee declared:

Enfin la Commission, sur la proposition de la Délégation néerlandaise eut encore à s'occuper de la forme qui serait donnée à la décision du Comité, approuvée par la Commission en principe, et d'après laquelle, par les stipulations de la Convention à conclure rien n'était changé, en quoique ce fût, à la situation actuelle des détroits. La Délégation néerlandaise désirait qu'une disposition comportant ce texte fût insérée dans le Règlement concernant la pose des mines. Après discussion, il fut jugé préférable de ne rien ajouter au texte du Règlement, mais de modifier le passage du Rapport qui parle de la résolution prise sur cette question par le Comité d'Examen; on établirait dans le Rapport que les détroits sont restés en dehors des délibérations de la présente Conférence et, tout en réservant expressément les déclarations faites au sein du Comité par les Délégations des Etats-Unis d'Amérique, du Japon, de la Russie et de la Turquie, on indiquerait la conviction de voir appliquer sur les mines dont on pourrait se servir dans les détroits les conditions techniques adoptées par le présent Règlement.

Reprinted in NIEMEYER, *supra* note 15, at 757, and SCOTT, *supra* note 15, at 654. See also Levie, *Commentary on the 1907 Hague Convention VIII*, in *THE LAW OF NAVAL WARFARE*, *supra* note 11, at 140, 145 ff., who rightly states that "there is no indication as to what the then existing law was actually considered to be with respect to such mining."

18. For the practice during the First World War, see Levie, *MINE WARFARE*, *supra* note 15, at 65, 77 ff.

19. See, *inter alia*, the announcements of the German government on 9 April 1940 concerning the Skagerrak between Lindesnes, Lodbjerg, and Flekkerøy, Sandnäs Hage (reprinted in OBERKOMMANDO DER KRIEGSMARINE, *URKUNDEN ZUM SEEKRIEGSRECHT* [Sept. 1, 1939 bis Aug. 31, 1940], no. 340 [Berlin 1941]) [hereinafter OKM, *URKUNDEN ZUM SEEKRIEGSRECHT*]; on 3 September 1939 concerning the southern entry of the Sound and the Great Belt (*id.*, no. 345); of 5 and 17 September 1939 concerning the Great Belt (*id.*, nos. 346 & 348); of 29 April concerning the Kattegat (*id.*, no. 354). The United Kingdom provided free passages in the Strait of Dover and in the Firth of Forth. See the statement by the Danish Ministry of Commerce of 3 September 1939. (*Id.*, no. 361).

20. For example, Swedish Ordinance no. 366 of 3 June 1966 (UN ST/LEG/SER.B/15, 259), as amended on 17 June 1982 (Ordinance concerning Intervention by Swedish Defence Forces in the Event of Violations of Swedish Territory in Peacetime and in Neutrality, Swedish Code of Statutes 1982:756), regulating the rights of foreign warships and military aircraft, is explicitly restricted to situations in which Sweden is not a party to the conflict. There remains therefore the possibility that Sweden will close its straits to enemy as well as neutral shipping.

21. 1949 I.C.J. 4.



22. *Id.* at 29.

23. For the characteristics of the Strait of Hormuz and its importance for international oil trade, see Milan, *Innocent Passage through the Strait of Hormuz*, 1982 REVUE HÉLLENIQUE DE DROIT INTERNATIONAL 247, 247 f.

24. In its statement of 1 October 1980, Iran declared that "in view of its international obligations, . . . Iran shall not hesitate in any effort to keep this waterway in full operation." See Rousseau, *Chronique*, 85 R.G.D.I.P. 174 (1981); Amin, 6 MARINE POLY 209 ff. (1982). In his letter to the Security Council, the Iranian foreign minister stated: "As certain rumours have been spread concerning the Straits of Hormuz, which might disturb international navigation in that areas, the Ministry of Foreign Affairs of the Islamic Republic of Iran reaffirms that Iran is committed to keeping the Straits open to navigation and will not spare any effort for the purpose of achieving this end." U.N. Doc. S/14226 (Oct. 22, 1980).

25. See the notes of protest by the United States, France, and the Netherlands printed in 85 DEPT. OF STATE BULL., May 1985, 9 & 46; 86 *id.* 71 (Aug. 1986); 87 *id.* 52 (April 1987); 87 *id.* 70 (June 1987), 87 *id.* 59, 66 (July 1987); 27 A.F.D.I. 895 (1981); 33 *id.* 849 (1987); 13 NETH. Y.B. INT'L L. 259 (1982).

26. Apart from the references in note 25, see the reply by the Secretary of State to Iranian protests against measures taken by the U.S. Navy in the Persian Gulf. In its essential part it reads as follows:

The procedures adopted by the United States are well established and fully recognized in international practice on and over international waters and straits such as the Persian Gulf, Strait of Hormuz, and the Gulf of Oman. The United States has made clear they will be implemented in a manner that does not impede valid exercises of the freedom of navigation and overflight and of the right of transit passage.

Reprinted in 78 AM. J. INT'L L. 885 (1984).

27. In Article 38(2) of the LOS Convention, transit passage is defined as "the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone." LOS Convention, *supra* note 2, art. 38.2. For an analysis of the provisions on straits, see Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 AM. J. INT'L L. 77 (1980).

28. In his speech of 5 February 1987, the British Foreign secretary stated, *inter alia*, that it has been recognized in State practice, international negotiations and the case law of the International Court that a special régime for navigation is appropriate in straits. . . . International law and practice have now developed to the point where, if the United Kingdom extends to 12 miles, we should afford to others the essential rights in some internationally important straits for which there is no alternative route, namely, the Straits of Dover, the North Channel lying between Scotland and Northern Ireland and the passage between Shetland and Orkney. These rights, which are widely recognised as necessary, include: a right of unimpeded passage through such straits for merchant vessels and warships; a right of overflight; the right of submarines to pass through the straits submerged; and appropriate safeguards for the security and other interests of the coastal State.

Hansard, H.L., Feb. 5, 1987, col. 382, reprinted in LAW OF THE SEA BULLETIN, No. 10, Nov. 1987, at 11.

In their common statement of 2 November 1988, the French and U.K. Governments acknowledged as generally accepted "the existence of a specific régime of navigation in straits,"



especially "rights of unimpeded transit passage for merchant vessels, state vessels and, in particular, warships following their normal mode of navigation, as well as the right of overflight for aircraft, in the Strait of Dover." Reprinted in *LAW OF THE SEA BULLETIN*, No. 14, Dec. 1989, at 14. See also ALEXANDER, *supra* note 13, at 98 ff; Robertson, *Passage of Ships through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea*, 20 VA. J. INT'L L. (1980).

29. Due to that expansion, in 116 cases sea areas formerly belonging to the high seas now have to be considered international straits in the sense of Article 37 of the LOS Convention. Note, however, that figures to be found in the literature differ considerably; they range from 130 to "over 116." See 1 O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 31 ff. (Shearer ed., 1982); KOH, *STRAITS IN INTERNATIONAL NAVIGATION* (1982); Reisman, *The Regime of Straits and National Security: An Appraisal of International Law Making*, 74 AM. J. INT'L L. 48, 59 (1980).

30. For example, the German delegate stated, "A prerequisite for the recognition of the coastal State's right to extend the territorial sea is the régime of transit passage through straits used for international navigation." U.N. Conf. on the Law of the Sea, XIV Off. Rec. 157, 158.

31. NWP 1-14M, *supra* note 9, § 9.2.3, para. 6.

32. For example, Iran has taken the position that the transit regime is not customary in character. U.N. Doc. S/20525, March 15, 1989. When signing the LOS Convention, Iran declared that it is binding upon States parties only. This declaration is printed in U.N. OFFICE OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL FOR THE LAW OF THE SEA, *STATUS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA* 18 (1985).

33. Especially by Spain (LOS Convention, II Off. Rec. 136 ff; XIV *id.* at 149 ff.; XVI *id.* at 243 ff.); Denmark (II, *id.* at 124); Algeria (*id.* at 137 ff.); Albania (*id.* at 139); Kuwait (*id.*); and the former People's Republic of Yemen (*id.* at 142).

34. FEDERAL MINISTRY OF DEFENSE, FEDERAL REPUBLIC OF GERMANY, *HUMANITARIAN LAW IN ARMED CONFLICT—MANUAL* (1992) [hereinafter ZDv 15/2].

35. In a background paper on naval mining of January 1978 (*Forudsætninger for dansk sominekrigsforelse*, S. III 5), the authors come to the following conclusion: "Relative to third parties, such minefields may be justified under the principles of international law relating to self-defence."

36. The distinction sometimes found in the literature between neutral warships and merchant vessels is made without any justification and can, therefore, be ignored. See Ronzitti, *Crisis*, *supra* note 11, at 20 ff.

37. See NWP 1-14M, *supra* note 9, § 9.2.3; Hoog, *Mines*, in 3 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 283, 284 (Bernhardt ed., 1982) [Encyclopedia hereinafter E.P.I.L.].

38. For a view to that effect, see Bothe, *Neutrality in Naval Warfare*, *supra* note 11, at 403; Ronzitti, *Passage through International Straits in Time of International Armed Conflict*, in 2 *INTERNATIONAL LAW AT THE TIME OF ITS CODIFICATION: ESSAYS IN HONOUR OF ROBERTO AGO* 363, 377 (1987).

39. Note that Articles 37ff. of the LOS Convention contain no provision on submarines. However, according to Article 39.1(c), ships and aircraft while exercising the right of transit passage are obliged only "to refrain from any activities other than those incident to their normal modes of continuous and expeditious transit." Hence, submarines are free to transit international straits submerged, since that is their normal mode of operation. See Lowe, *The Commander's Handbook on the Law of Naval Operations*, in *THE LAW OF NAVAL OPERATIONS*, *supra* note 13, at 109, 122; Reisman, *supra* note 29, at 62 ff. (1980); Moore, *Regime*, *supra* note 27, at 117 ff. (1980). For the origin of Article 39 and its strategic implications, see Clove, *Submarine Navigation in International Straits: A Legal Perspective*, 39 *NAVAL L. REV.* 103 (1990); Burke,

*Submerged Passage through Straits*, 52 WASH. L. REV. 193 (1977); Grunawalt, *United States Policy on International Straits*, 18 OCEAN DEV. & INT'L L.J. 445 (1987).

40. For the technical aspects of anti-submarine warfare, see JOPP, MARINE 200, at 127 ff., 153 ff. (1989).

41. As early as 1954 Baxter came to the following conclusion: "There is some basis for concluding that a belligerent is under an obligation to provide passage, subject to reasonable measures of security and control such as compulsory pilotage and navigation by day, to neutral vessels and that it may completely block passage of a strait only as a last resort in the most urgent and compelling of circumstances." Baxter, *supra* note 11, at 204. Of course, this conclusion was related to innocent passage, since transit passage was still unknown in 1954. For a contrary view, see RAUCH, *supra* note 11, at 45. Rauch merely acknowledges a belligerent right to subject neutral shipping to "reasonable measures of security and control." This conclusion is, however, not drawn from State practice but only founded upon the judgement in the Corfu Channel case.

42. For a characterization to that effect, see Heintschel von Heinegg, *The Current State of International Prize Law*, in INTERNATIONAL ECONOMIC LAW AND ARMED CONFLICT 5, 25 ff. (Post ed., 1994).

43. Note that there exists no right of overflight in straits governed by Articles 36 and 38.1, first alternative.

44. NWP 1-14M, *supra* note 9, § 9.2.3.3.

45. In this context, it suffices to mention Articles 34 and 39 of the 1923 Hague Rules on Aerial Warfare, which can be considered customary law. See SPETZLER, LUFTKRIEG UND MENSCHLICHKEIT 156 (1956). For a more cautious view, see Bierzanek, *Commentary on the 1923 Hague Rules*, in THE LAW OF NAVAL WARFARE, *supra* note 11, at 396, 404 ff.

46. See CANADIAN ARMED FORCES, LAW OF ARMED CONFLICT MANUAL (Second Draft), § 1521 (n.d.), [hereinafter CANADIAN DRAFT MANUAL]; Ronzitti, *Crisis*, *supra* note 11, at 25. This does not prejudice the legal status of civilian passenger aircraft.

47. See the ICAO Report, Nov. 7, 1988, 28 I.L.M. 900 (1989); Friedman, *The Vincennes Incident*, U.S. NAVAL INST. PROC., May 1989, at 74; Evans, *Vincennes—A Case Study*, U.S. NAVAL INST. PROC., Aug. 1993, at 49.

48. For example, the Swedish Ordinance of 1966, *supra* note 20.

49. Statement by the Swedish delegate during the third session of the second subcommittee, July 27, 1907, printed in NIEMEYER, *supra* note 15, at 1009.

50. Reprinted in *id.* at 922.

51. While the Ottoman delegate referred to the Bosphorus and the Dardanelles, the Japanese delegate stated, "Le Gouvernement japonais ne prenait aucun engagement concernant les détroits qui séparent les nombreuses îles ou flots qui composent l'empire japonais et qui ne sont que des parties intégrantes de l'empire." *Id.* at 893.

52. Report of Oct. 9, 1907, reprinted in *id.* at 893.

53. In 1927 Jessup maintained that the applicability of the right of innocent passage to international straits "requires no supporting argument or citation." He conceded, however, that there was no general agreement with regard to warships. See JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 120 (1927).

54. The same view was taken by Wehberg, *Das Seekriegsrecht*, in V HANDBUCH DES VÖLKERRECHTS 418 (Stier-Somlo ed., 1915). Rauch draws a different conclusion from the conference history: "From the opinions expressed, it seemed that a neutral State may forbid even innocent passage through limited parts of its territorial waters so far as that was considered necessary to maintain its neutrality, but that this prohibition could not extend to straits uniting two open seas." RAUCH, *supra* note 11, at 41. Rauch also refers to the statement of the



Norwegian delegate concerning the right of innocent passage in time of war. However, that statement contains nothing in relation to international straits; it is proof only for the customary character of Article 10 of Hague Convention XIII. Ronzitti, *Crisis*, *supra* note 11, at 19.

55. See the references in WHITEMAN, 11 DIGEST OF INTERNATIONAL LAW 276 ff. (1968) (on State practice during armed conflicts before 1945).

56. The respective announcements and proclamations are printed in REICHS-MARINE-AMT, SEEKRIEGSRECHT IM WELTKRIEG (SAMMLUNG DIPLOMATISCHER NOTEN UND ANDERER URKUNDEN. ZUSAMMENGESTELLT IM AUFTRAGE DES STAATSEKRETÄRS DES REICHS-MARINE-AMTS), 3 vols. (1916); and in OKM, URKUNDEN ZUM SEEKRIEGSRECHT, *supra* note 19. See also, RAUCH, *supra* note 11, at 32 ff.

57. 188 L.N.T.S. 294-331.

58. See Articles 2.3 and 8.1 respectively for Denmark and Sweden. See also Bring, *Commentary on the 1938 Stockholm Declaration*, in THE LAW OF NAVAL WARFARE, *supra* note 11, at 839, 891, who concludes that "the Danish and Swedish Regulations implicitly confirmed the traditional right of unimpeded passage of foreign warships in time of war through the Baltic Straits."

59. Note that the Harvard Draft of 1939 contains no explicit prohibition on closing neutral international straits. There is only one reference to straits in the commentary on Article 25. That commentary is, however, restricted to the Turkish Straits, the Suez, and the Panama Canal. Otherwise, it is stated that the Permanent Court of International Justice (PCIJ), in the case of the *Wimbledon*, ruled that the use of international waterways is in accordance with neutrality.

60. See Memorandum by the German Foreign Office of 6 June 1941, *reprinted* in OKM, URKUNDEN ZUM SEEKRIEGSRECHT, *supra* note 19, no. 432.

61. For the few examples of belligerent warships transiting neutral international straits, see O'CONNELL, THE INFLUENCE OF LAW ON SEA POWER 99 ff. (1975).

62. See the Swedish Ordinance of 1966, *supra* note 20, and the Danish Ordinance of 27 February 1976 concerning admittance of foreign warships and military aircraft (U.N. ST/LEGSER.B/19, 142). The Swedish Ordinance was revised by the Ordinance of 17 June 1982 concerning Intervention by Swedish Defence Forces in the Event of Violations of Swedish Territory in Peacetime and in Neutrality (Swedish Code of Statutes 1982:756). The restrictions of the transit right of foreign warships and military aircraft does not apply in the Öresund, where no prior notice is necessary. See also RAUCH, *supra* note 11, at 43 ff.

63. RAUCH, *supra* note 11, at 44. Rauch believes that "taken together, doctrine and State practice would seem to justify the conclusion that if the littoral States are neutral, innocent passage of belligerent warships through international straits in time of war may be interfered with only in exceptional cases." See also 2 OPPENHEIM, INTERNATIONAL LAW 696 (7th ed., Lauterpacht ed., 1963), who, by reference to an *obiter dictum* of the PCIJ in the *Wimbledon* case, claims an unrestrictable right of transit passage. The PCIJ had mentioned "the general opinion according to which, when an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign State under whose jurisdiction the waters in question lie." P.C.I.J. Ser. A., No. 1, 28. A more cautious approach is taken by Castrén, who states, "Transit by belligerent warships may probably not, however, be prevented in those straits connecting different parts of the high seas where the territorial waters of one or several neutral coastal States meet." CASTRÉN, THE PRESENT LAW OF WAR AND NEUTRALITY 518 (1954).

64. In Article 17 of its draft (U.N. Doc. A/3159), the International Law Commission (ILC) had proposed the following wording: "There must be no suspension of the innocent passage of



foreign vessels through straits normally used for international navigation between two parts of the high seas." Hence, in the final wording there is no longer a reference to the "normal use" for international navigation.

65. See, *inter alia*, Alexander, *International Straits*, *supra* note 13, at 97 ff.; O'CONNELL, *INFLUENCE*, *supra* note 61, at 103 ff.

66. 1 O'CONNELL, *LAW OF THE SEA*, *supra* note 29, at 317; KOH, *supra* note 29, at 27; Reisman, *supra* note 29, at 59.

67. Note that the right of transit passage does not apply to internal waters within a strait "except where the establishment of a straight baseline . . . has the effect of enclosing as internal waters areas which had not previously been considered as such." LOS Convention, *supra* note 2, art. 35(a). Although the legal status of internal waters within an international strait is of special relevance for the Northeast and Northwest passages, the status of these sea areas is still unclear; see the exchange of notes between the United States and the former USSR in DEPT. OF STATE, *LIMITS IN THE SEAS*, No. 112, at 68 ff. (1992). See also Rothwell, *The Canadian-U.S. Northwest Passage Dispute: A Reassessment*, 26 CORNELL INT'L L.J. 331 (1993).

Another open question is the legal status of the entries to an international strait if they are completely overlapped by the littoral States' territorial seas. This is the case in the Strait of Magellan and in the Beagle Channel. It follows, however, from the object and purpose of the right of transit passage that there also exists a right of passage and overflight that may not be hampered or suspended. This is the position taken by the U.S. Department of State vis-à-vis Chile and Argentina. See *LIMITS IN THE SEAS*, No. 112, *supra*, at 63.

68. LOS Convention, *supra* note 2, art. 38.1. For an analysis, see Young, *The Evolution of a Proposed New Navigation Rule: The "Duty Not to Impede,"* 17 J. MAR. L. & COM. 119 (1986).

69. LOS Convention, *supra* note 2, art. 39.1(a-c).

70. Convention on the International Regulations for Preventing Collisions at Sea of 20 October 1972; International Convention for the Prevention of Pollution from Ships (MARPOL) of 2 November 1973; International Convention for the Safety of Life at Sea (SOLAS) of 1 November 1974.

71. LOS Convention, *supra* note 2, art. 39.2(a). Note that State aircraft "will normally comply with such safety measures." *Id.*, art. 39.3(a).

72. *Id.*, art. 41.1.

73. *Id.*, art. 42.2.

74. Bryde, *Militärische und sicherheitspolitische Implikationen der neuen Seerechtskonvention*, in *DAS NEUE SEERECHT* 151, 176 (Delbrück ed., 1984).

75. See, *inter alia*, ROACH & SMITH, *EXCESSIVE MARITIME CLAIMS* 177 ff. (66 *International Law Studies*, 1994); MÜNCH, *DIE RÉGIME INTERNATIONALER MEERENGEN VOR DEM HINTERGRUND DER DRITTEN UN-SEERECHTSKONFERENZ* 127 ff. (1982) (on the customary character of the provisions).

76. Alexander, *supra* note 13, at 91; RAUCH, *supra* note 11, at 48; Robertson, *supra* note 28, at 843 ff.; Moore, *supra* note 27, at 95; Clove, *supra* note 39, at 108 ff.; Burke, *supra* note 39, at 193; Bryde, *supra* note 74, at 176 f., 182 ff; MÜNCH, *supra* note 75, at 111 ff.

77. Alexander, *International Straits*, *supra* note 13, at 93; RAUCH, *PROTOCOL ADDITIONAL*, *supra* note 11, at 45 ff.; ROBERTSON, *supra* note 14, at 21 f.; Dinstein, *supra* note 37, at 19 f.; MÜNCH, *supra* note 75, at 44; Harlow, *The Law of Neutrality at Sea for the 80's and Beyond*, 3 UCLA PACIFIC BASIN L.J. 42, 50 (1984); Grunawalt, *Belligerent and Neutral Rights in Straits and Archipelagos*, in *THE LAW OF THE SEA: WHAT LIES AHEAD?* 137 (Clingan ed., 1988); Ronzitti, *Passage*, *supra* note 38, at 366 ff. See also para. 29 of the San Remo Manual: "Neutral States may not suspend, hamper, or otherwise impede the right of transit passage . . ."

SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, para. 29 (Doswald-Beck ed., 1995). Only Lowe seems to have doubts as regards the validity of the right of transit passage during armed conflict. Lowe, *supra* note 39, at 123.

78. "Customary international law as reflected in the 1982 Law of the Sea Convention provides that belligerent and neutral surface ships, submarines, and aircraft have a right of transit passage through, over, and under all straits used for international navigation. Neutral nations cannot suspend, hamper, or otherwise impede this right of transit passage through international straits." NWP 1-14M, *supra* note 9 § 7.3.5. "The airspace above neutral international straits . . . remains open at all times to belligerent aircraft, including armed military aircraft, engaged in transit . . . passage." *Id.*, § 7.3.7.

79. "Warships and military aircraft of a belligerent state may exercise the right of transit passage, that is, of essentially unimpeded passage or overflight . . . through certain straits where the transit passage applies." CANADIAN DRAFT MANUAL, *supra* note 46, § 1511.2.

80. "While transit passage through international straits . . . include[s] the right of overflight and the right of passage in submerged mode." ZDv 15/2, *supra* note 34, § 1126.

81. In the Danish background paper, *supra* note 35, the authors consider the legal status unclear. It must be kept in mind, however, that that paper was written in 1978. Moreover, it is made clear that "in the case of international straits the legality of a minefield will presumably depend on whether passage of the straits by the belligerents is 'innocent' in relation to the peace, order and security of the coastal State."

82. Harlow, *supra* note 77, at 50.

83. RAUCH, *supra* note 11, at 46.

84. NWP 1-14M, *supra* note 9, § 7.3.5. "The rights of transit passage . . . applicable to international straits . . . in peacetime continue to apply in times of armed conflict. The laws and regulations of States bordering straits . . . relating to transit passage . . . adopted in accordance with general international law remain applicable." SAN REMO MANUAL, *supra* note 77, para. 27.

85. LOS Convention, *supra* note 2, art. 40. *See also*, Alexander, *supra* note 13, at 93.

86. "A belligerent in transit passage through, under and over a neutral international strait . . . is required to proceed without delay, to refrain from the threat or use of force against the territorial integrity or political independence of the neutral littoral . . . State, or in any other manner inconsistent with the purposes of the Charter of the United Nations, and otherwise refrain from any hostile actions or other activities not incident to their transit." SAN REMO MANUAL, *supra* note 77, para. 30. *See also*, Ronzitti, *supra* note 38, at 369 f.

87. SAN REMO MANUAL, *supra* note 77, paras. 15-17; NWP 1-14M, *supra* note 9, § 7.3.5; ZDv 15/2, *supra* note 34, § 1118 ff. For the Egyptian action taken in the strait of Bab al Mandab, *see* O'CONNELL, *supra* note 61, at 101 ff.

88. Alexander, *supra* note 13, at 93.

89. Hence, there is no difference with the applicable peacetime rule. In view of the vulnerability of surfaced submarines, it would be unrealistic to prohibit submerged transit. Moreover, the neutral State is thus not obliged to monitor the strait, which would necessitate the use of expensive equipment. *See* Harlow, *supra* note 77, at 51 (1984); Ronzitti, *supra* note 38, at 370 ff.

90. CANADIAN DRAFT MANUAL, *supra* note 46, § 1511.2.

91. NWP 1-14M, *supra* note 9, § 7.3.5.

92. *Id.*, § 7.3.7.1.

93. "Belligerents passing through, under and over neutral straits . . . are permitted to take defensive measures consistent with their security, including launching and recovery of aircraft,



screen formation steaming, and acoustic and electronic surveillance." SAN REMO MANUAL, *supra* note 77, para. 30.

94. This may also be based upon the judgement of the ICJ in the *Corfu Channel Case*, because the Court did not consider the transit of British warships, which had been in a state of readiness, contrary to international law. 1949 ICJ Rep. 1 ff. *See also*, Harlow, *supra* note 77, at 51:

Because straits are natural "choke points," no naval commander can pass through without being prepared to respond to hostile action. In the regime of transit passage, the concept of peacetime transit in the "normal mode" includes the use of routine defensive measures such as air and surface search radar, and sonar. In wartime, the use of such defensive measures, which do not threaten the coastal state or its resource interests, is made even more necessary by the heightened potential for imminent attack. Attempts by neutrality laws to restrict such measures would be highly unrealistic and possibly counterproductive since they could breed disrespect for the laws in general.

95. For example, common Article 8.2 of the 1938 Stockholm Declaration, *supra* note 57, provides that "[a]ircraft carried on board belligerent warships shall not leave such vessels while in . . . territorial waters." There is no indication that this rule is not to apply in international straits.

96. *See* O'CONNELL, *supra* note 61, at 103 ff.

97. *See also* SAN REMO MANUAL, *supra* note 77, para. 30. "Belligerents in transit . . . passage may not, however, conduct offensive operations against enemy forces, nor use such neutral waters as a place of sanctuary or as a base of operations."

98. SAN REMO MANUAL, *supra* note 77, explanation of para. 30.1.

99. RAUCH, *supra* note 11, at 49. The differences between international straits where the right of transit passage applies and those where it does not apply are ignored by Ronzitti. *See, e.g., Passage*, *supra* note 38, at 363 ff.

100. LOS Convention, *supra* note 2, art. 45. *See* Alexander, *International Straits*, *supra* note 13, at 99, 103.

101. For example, Finland still claims a territorial sea of four nautical miles in breadth. *See* Law No. 463 of 18 August 1956; LAW OF THE SEA BULLETIN 29, No. 2, March 1985. Therefore, in the Gulf of Finland there remains an open corridor. The example given by Alexander (*International Straits*, *supra* note 13, at 100) concerning the Bass Strait between Australia and Tasmania is not valid any longer; on 20 November 1990 Australia extended its territorial sea from three to twelve nautical miles. *See* the Statement by the Permanent Representative of Australia to the UN of 29 November 1990, *reprinted in* LAW OF THE SEA BULLETIN 8, No. 18, June 1991.

102. Alexander, *supra* note 13, at 100.

103. RAUCH, *supra* note 11, at 47 f.; Alexander, *supra* note 13, at 99 f.

104. This is the case if the breadth of the remaining corridor is not sufficient for the safety of navigation. An example given by Alexander (*id.* at 100) is the Bahamas. If the Bahamas extended the territorial sea to twelve nautical miles, the breadth of the remaining corridor in the Providence Channel would measure 0.25 nautical miles. However, IMO requires a breadth of three nautical miles in order to guarantee as safe a passage as possible.

105. RAUCH, *supra* note 11, at 48. Rauch also refers to strategic submarines, which might be unable to keep to the corridor simply because it is not deep enough.

106. *Id.* at 48.

107. The Strait of Messina between the Italian mainland and Sicily has a breadth of two nautical miles. For the Italian position during the Conference, *see* the statement by the Italian delegate *reprinted in* UNCLOS III, Off. Rec. 130. *See also* MÜNCH, MEERENGEN, *supra* note 81.



108. Italy was supported by the British delegation. See UNCLOS, II Off. Rec., Vol. 125. According to the British view, the following straits fulfil the conditions of Article 38.1., LOS Convention: the Pentland Firth south of the Orkney Islands, and the passage between Cornwall and the Scilly Islands. Hansard, 484 H.L., Feb. 5, col. 382.

109. For further examples (like Messina), see Alexander, *supra* note 13, at 101.

110. As of 3 April 1985, Italy has subjected international navigation to a number of restrictions. Oil tankers of more than ten thousand tons may no longer transit the strait. Oil tankers of more than five thousand tons and all other ships of more than ten thousand tons are assigned to compulsory piloting. The United States, by a diplomatic note of April 5, 1985, has emphasized that it considers these measures only preliminary in character and not applicable to warships; LIMITS IN THE SEAS, No. 112, *supra* note 67, at 68.

111. This provision has its origin in corresponding endeavours by Denmark, Finland, and Turkey. See UNCLOS, III, Off. Rec. 124 f., 132 f.

112. In Article V, para. 2, of the Egyptian-Israeli Peace Treaty of March 26, 1979, *reprinted in THE ARAB-ISRAEL CONFLICT AND ITS RESOLUTION: SELECTED DOCUMENTS* 218 ff. (Lapidoth & Hirsch eds., 1992), the two States have agreed as follows: "The Parties consider the Strait of Tiran and the Gulf of Aqaba to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight. The Parties will respect each other's right to navigation and overflight for access to either country through the Strait of Tiran and the Gulf of Aqaba." While in view of the date of signature, that treaty will hardly qualify as a "long-standing international convention," it is declaratory of the right of transit passage as laid down in the LOS Convention. See also MÜNCH, MEERENGEN, *supra* note 75, at 53; Lapidoth, *The Strait of Tiran, the Gulf of Aqaba, and the 1979 Treaty of Peace between Egypt and Israel*, 77 AM J. INT'L L. 99 (1983). A more cautious view is taken by Alexander, *supra* note 13, at 102. See also Fink, *The Gulf of Aqaba and the Strait of Tiran: The Practice of "Freedom of Navigation" after the Egyptian-Israeli Peace Treaty*, 42 NAVAL L. REV. 121 (1995).

113. See Moore, *supra* note 27, at 111 (1980); Alexander, *supra* note 13, at 101 ff.; Barabolja in 1 MODERNES SEEVÖLKERRECHT 230 (1978); ROACH & SMITH, *supra* note 75, at 177 ff.

114. Apart from the sources cited in note 113, see RAUCH, *supra* note 11, at 50; LIMITS IN THE SEAS, No. 112, *supra* note 67, at 65. There is good reason to believe that the delegates to UNCLOS III had these straits in mind.

115. *Reprinted in THE LAW OF NAVAL WARFARE*, *supra* note 11, at 437. For an analysis, see Vignes, *Commentary on the 1936 Montreux Convention*, *id.* at 468, 472 ff.; MÜNCH, *supra* note 75, at 45 ff.

116. Arts. 2-5. However, if Turkey is a belligerent, the Turkish Straits remain open for neutral merchant vessels only—which have to travel by daytime, must respect the sealanes designated by the Turkish authorities (art. 5.2), and are subjected to compulsory pilotage (art. 6).

117. With regard to the passage of the Kiev in 1976, see Knight, *The Kiev and the Turkish Straits*, 71 AM. J. INT'L L. 125 (1977); MÜNCH, *supra* note 75, at 47 ff. For State practice during World War II, see WHITEMAN, *supra* note 55, at 277 ff.

118. For States bordering the Straits, the time limit is nine days; for all other States it is fifteen days (art. 13).

119. If Turkey is a belligerent, art. 20 applies. For the wording, see *supra*, text following note 10.

120. Art. 19.2. Note, however, that this does not apply if, under the Covenant of the League of Nations or another pact of mutual assistance concluded within the League's framework, there

exist special obligations for Turkey. This presupposes that the State whose warships are to transit the Straits is the victim of an act of aggression.

121. Martens, XVI NOUVEAU RECEUIL GÉNÉRAL 491 (1887).

122. Reprinted in LAW OF THE SEA BULLETIN, No. 4, Feb. 1985, at 50.

123. That view is taken by RAUCH, *supra* note 11, at 52.

124. Hence, Münch in his analysis of the Treaty of 1881 comes to the conclusion that that treaty is a typical "long-standing convention in the sense of Article 35(c) UNCLOS." MÜNCH, *supra* note 75, at 53.

125. See the references in LIMITS IN THE SEAS, No. 112, *supra* note 67, at 67; ROACH & SMITH, *supra* note 75, at 194. See also note 36 to § 2.3.3.1 of the annotated version of NWP 9, the predecessor of NWP 1-14M.

126. The same position was taken by the U.S. Secretary of State in a statement of 21 December 1984 (reprinted in LIMITS IN THE SEAS, No. 112, *supra* note 67, at 67):

This long-standing guarantee of free navigation for all vessels has been amply reinforced by practice, including practice recognizing the right of aircraft to overfly. . . . Essentially, the USG position would be that the 1881 Treaty and over a century of practice have imbued the Strait of Magellan with a unique regime of free navigation, including the right of overflight. That regime has been specifically recognized and reaffirmed by both Argentina and Chile in the Beagle Channel Treaty. Hence, the United States and other States may continue to exercise navigational and overflight rights and freedoms in accordance with this long-standing practice.

127. London Declaration by France and the United Kingdom concerning Egypt and Morocco, art. VII, Apr. 8, 1904, reprinted in MARTENS, XXXII NOUVEAU RECEUIL GÉNÉRAL 18 (1905). Spain acceded on Oct. 3, 1904. Franco-Spanish Declaration of Mutual Assistance in Mediterranean Affairs, May 16, 1907, 204 PARRY'S T.S. 353. Anglo-Spanish Declaration of Mutual Assistance in Mediterranean Affairs, May 16, 1907, *id.* at 179. Franco-Spanish Accord concerning Morocco, art. 6, Nov. 27, 1912, 217 PARRY'S T.S. 288. Sometimes the Treaty of Utrecht of 13 July 1713, by which Philip V ceded Gibraltar to England, is referred to. However, art. 10 does not regulate the high seas corridor between Gibraltar and North Africa. Still, Spain maintains that the provisions of the LOS Convention on straits do not apply to that sea area. Upon signature, Spain declared that "[t]he Spanish Government, upon signing this Convention, declares that this act cannot be interpreted as recognition of any rights or situations relating to the maritime spaces of Gibraltar which are not included in article 10 of the Treaty of Utrecht of 13 July 1713 between the Spanish and British Crowns," reprinted in STATUS, *supra* note 32, at 25.

128. See TRUVER, THE STRAIT OF GIBRALTAR AND THE MEDITERRANEAN 179 (1980); ROACH & SMITH, *supra* note 75, at 185 ff.

129. See the references in Alexander, *supra* note 13, at 102. See also Saenz de Santa & Paz, *Spain and the Law of the Sea—Selected Problems*, 32 ARCHIV DES VÖLKERRECHTS 202 (1994). When signing the LOS Convention, Spain declared: "It is the Spanish Government's interpretation that the régime established in part III of the Convention is compatible with the right of the coastal State to issue and apply its own air regulations in the air space of the straits used for international navigation so long as this does not impede the transit passage of aircraft" (*supra* note 127). According to the Spanish position, this recognition of the right of overflight is without prejudice to the legal status of the Strait of Gibraltar because Spain has made clear that its signature does not affect "the maritime spaces of Gibraltar."

130. Alexander, *International Straits*, *supra* note 13, at 102; O'CONNELL, *supra* note 61, at 98.

131. *Ibid.*



132. See RAUCH, *supra* note 11, at 52. See also MÜNCH, *supra* note 75, at 52, who considers the treaties obsolete.

133. MARTENS, NOUVEAU RECEUIL GÉNÉRAL, série I, tome XVI, partie II, 345 ff. The following States and entities were parties to that treaty: Austria, Belgium, Denmark, France, Hannover, the Cities of the Hanse, Mecklenburg-Schwerin, the Netherlands, Oldenburg, Prussia, Russia, Sweden-Norway, and the United Kingdom.

134. U.S.-Danish Convention on Discontinuance of Sound Dues, 11 Stat. 719, T.S. 67.

135. During the deliberations on the LOS Convention, the Danish delegate declared that "after negotiations with all interested parties his delegation was satisfied that Art. 35(c) applied to the specific regime in the Danish straits." U.N. Doc. A/CONF.62/SR. 138, at 35 (1980). See also U.N. Doc. A/CONF.62/SR. 163, at 10 (1982). During the eleventh meeting of the Second Committee the Danish delegate stated "that some straits, such as the Danish straits leading to the Baltic Sea, had never been subject to the right of free passage but had been under a special régime serving the interests of both the coastal State and the international community; such a type of arrangement should remain in effect." UNCLOS III, Off. Rec. 124. For the Order of the ICJ of 29 July 1991 on Provisional Measures, see Gray, *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, Order of July 29, 1991, 42 INT'L & COMP. L.Q. 705 (1993); Koskenniemi, *L'affaire du passage par le Grand Belt*, 38 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 905 (1992).

136. The former USSR accepted the Danish regulations because it considered the Baltic Straits excluded from the régime of transit passage by the Treaty of 1857. See also the references in ROACH & SMITH, *supra* note 75, at 215 ff.

137. See note 36 to § 2.3.3.1, NWP 1-14M, *supra* note 9; MÜNCH, *supra* note 75, at 50.

138. Rauch, DIE SOWJETUNION UND DIE ENTWICKLUNG DES SEEVÖLKERRECHTS 81 ff., 289 ff., 305 (1982). A more cautious view is taken by Bryde, *supra* note 74, at 187. For the contrary view, see MÜNCH, MEERENGEN, *supra* note 75, at 51.

139. *Supra* text to notes 55 ff. (for the practice of Scandinavian States).

140. Ordinance Concerning Intervention by Swedish Defence Forces in the Event of Violations of Swedish Territory in Peacetime and in Neutrality, *supra* notes 20 and 62. See also Bring, *supra* note 58, at 841.

141. When signing the LOS Convention, the Swedish delegate declared:

It is the understanding of the Government of Sweden that the exception from the transit passage régime in straits provided for in article 35(c) of the Convention is applicable to the strait between Sweden and Denmark (Oresund) as well as to the strait between Sweden and Finland (the Åland Islands). Since in both those straits the passage is regulated in whole or in part by long-standing international conventions in force, the present legal régime in the two straits will remain unchanged after the entry into force of the Convention.

Reprinted in STATUS, *supra* note 32, at 26.

142. *Id.*

143. See the declaration of the Finnish delegate during UNCLOS III, U.N. Doc. A/CONF.62/SR.135 (1980), at 8.

144. RAUCH, *supra* note 11, at 52. For further references, see ROACH & SMITH, *supra* note 75, at 182 ff.

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## Some Thoughts on Ideas That Gave Rise to International Humanitarian Law

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Géza Herczegh

INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN armed conflicts has been defined by the International Committee of the Red Cross as “international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict.”<sup>1</sup>

One can, of course, refer more concisely to the “law of armed conflicts”—usually divided into two branches, the law of Geneva and the law of The Hague. The Geneva Conventions relating to the protection of victims of armed conflicts are, after the United Nations Charter, the most widely accepted international instruments and constitute an impressive set of legal norms presented in more than six hundred articles.

As we prepare to pass from the second to the third millennium, and in spite of the great progress made in this field, grave violations of the law of armed



conflict, sometimes degenerating into veritable genocidal feuding between ethnic groups, can still be witnessed. There are even cases involving members of regular armies on peace-keeping missions who fail to respect the rules of humanitarian law. These facts invite us to enquire into the humanitarian ideas that have promoted the development of this set of legal rules, and into the difficulties lying in the way of its implementation.

In this context, it may be of interest to recall one of Plato's famous Dialogues, in which his characters converse as follows:

"And they will conduct their quarrels always looking forward to a reconciliation?"

"By all means."

"They will correct them, then, for their own good, not chastising them with a view to their enslavement or their destruction, but acting as correctors, not as enemies."

"They will," he said.

"They will not, being Greeks, ravage Greek territory nor burn habitations, and they will not admit that in any city all the population are their enemies, men, women and children, but will say that only a few at any time are their foes, those, namely, who are to blame for the quarrel. And on all these considerations they will not be willing to lay waste the soil, since the majority are their friends, nor to destroy the houses, but will carry the conflict only to the point of compelling the guilty to do justice by the pressure of the suffering of the innocent."

"I," he said, "agree that our citizens ought to deal with their Greek opponents on this wise, while treating barbarians as Greeks now treat Greeks."<sup>2</sup>

In other words, proper treatment had to be given to Hellenes in their dealings with each other but needed not be accorded to barbarians. A double standard of conduct in armed conflicts emerges from these lines, one so characteristic of the history of humanitarian law—the dichotomy between the desired and the actual conduct, the norm and the practice—while at the same time reflective of the differences between total and limited wars, or, to put it in a different way, conflicts between systems and conflicts within a system.

The Greek city-States formed a kind of international community—a political system—surrounded by an alien "barbarian" world. In the teachings of Christianity there undoubtedly existed a tendency towards universality—the

Gospel was meant for all—but there was a time when the Roman Catholic Church, organized as a political power, held the view that “*fides non est habenda cum infidelibus*” (promises made to infidels need not be kept). Agreements concluded with rulers outside of Christendom were not binding; the international legal community included only the Christian States. In the sixteenth century it was not an easy task for Francisco de Vitoria to demonstrate that the Indians were also legitimate owners of their land and properties—in other words, genuine subjects of law.<sup>3</sup> It is also true that his teachings generally failed to prevail in the practice of his own time. The lot of the Indians in the wars of the conquistadors was a hard one—either extermination or slavery.

From the works of Hugo Grotius, the greatest figure ever in the science of international law, we get a dark and dismal picture of contemporary rules of warfare: “Such persons therefore may be slain with impunity in their own land, in the land of an enemy, on land under the jurisdiction of no one, or on the sea. . . . How far this right to inflict injury extends may be perceived from the fact that the slaughter even of infants and of women is made with impunity, and that this is included in the law of war. . . . Not even captives are exempt from this right to inflict injury.”<sup>4</sup> Following Horatius, Grotius admits that a prisoner may be killed, but he qualifies the rape of a woman as a violation of the law of nations. “It is not strange,” he stated, “that the law of nations has permitted the destruction and plunder of the property of enemies, the slaughter of whom it has permitted.”<sup>5</sup> Also, “[b]y the law of nations not merely he who wages war for a just cause, but in a public war also, any one at all becomes owner, without limit or restriction, of what he has taken from the enemy.”<sup>6</sup> As a result of the authority he attributed to Greek and Roman authors of antiquity, Grotius still considered this to be lawful, a conclusion likewise supported by the practice of the Thirty Years’ War, which was raging when his book was published. But at the same time he expressed the opinion “that many things are said to be ‘lawful’ or ‘permissible’ for the reason that they are done with impunity, in part also because coactive tribunals lend to them their authority; things which nevertheless either deviate from the rule of right (whether this has its basis in law strictly so called or in the admonition of other virtues) or at any rate may be omitted on higher grounds and with greater praise among good men.”<sup>7</sup> Grotius warned against undertaking wars rashly even for just causes, and referring to criteria of justice, morality, and equity, also made noble attempts to convert the long-standing practices of belligerents into a more humane form of conduct.

At the same time, historical research reveals not only a great deal of cruelty, devastation, and destruction in armed conflicts but also many efforts designed



to reduce suffering and assist the victims. King Cyrus of Persia, when taking Babylon in 538 B.C., strictly obliged his soldiers to show respect for the sanctity of shrines and to treat the vanquished peoples humanely. The Code of Manu in India, dating from the first century B.C., forbade the use of fiery arrows and poisoned spears, as well as the killing of wounded or sleeping men.<sup>8</sup> The Romans held the view that the use of poison in war should be forbidden: "*Armis bella non venenis geri debere.*"<sup>9</sup> When Alaric took Rome in A.D. 410, his Goths respected the Christian churches and spared the lives of those taking refuge there.<sup>10</sup> Still more examples may be found. The Lateran Council of 1139 declared the use of bows and arrows illegal.<sup>11</sup> The prohibition of the use of various weapons and the designation of days on which it was forbidden to wage war were matters of controversy at that time; so too were the rules of knightly warfare, and even the treatment of prisoners of war.<sup>12</sup> The principal duty of certain orders of chivalry, such as the Order of St. John of Jerusalem (otherwise called the Hospitallers),<sup>13</sup> was precisely to redeem Christian prisoners from pagan captivity.

Similar ideas and conceptions are found not only in the community of the Christian feudal States taking shape amid the ruins of Roman civilization, but also in the Islamic world,<sup>14</sup> the great civilisations of Asia,<sup>15</sup> and elsewhere.<sup>16</sup> What is more, if one continues with these historical investigations it is possible to discern, in addition to sometimes exaggerated but never unfounded information on the havoc wreaked by war, signs of the efforts made by every people in every age to reduce that devastation. For example, Diallo and others who explored the humanitarian traditions among the peoples of sub-Saharan Africa demonstrated that when engaged in armed conflicts they displayed, in several respects, both moderation and clemency to their enemies.<sup>17</sup>

However, neither these rules—however respectable—for conduct prevailing within a limited space, nor the customs of peoples who had no State organization at the time, can justifiably be included in the body of international law of armed conflicts as giving protection to victims; one cannot begin the history of that law with data taken from the remotest times. The examples cited above are only elements, building blocks which contributed to the emergence of an international custom over the course of long centuries; they cannot qualify as international law in the strict sense of the word. Their application in inter-State relations was not binding, an indispensable criterion of the rules of international law. Moreover, they drew no support from an underlying idea that protection is extended equally to every man, by virtue of his being a man. Finally, they did not pretend to universality, which is one of the essential

characteristics of our international law protecting the victims of armed conflicts.

What are the origins of these principles? From where and how did the ideas that inspired their content emerge? Is it possible to deduce from human nature any rule stipulating that during armed conflicts the civilian population has to be protected and certain groups of the population accorded special care, or that those who belong to the armed forces, but because of injury, sickness, or other reasons have become unfit for combat or unable to fight and have surrendered require protection of their lives, health, and human dignity, without discrimination based on origin, race, nationality, cultural affinity, or other criteria?

The classic authors on the theory of international law, such as Grotius, his predecessors, and his followers, were inspired by a natural law approach. The essence of the natural law approach was that there are rights and duties preceding positive law or superior to it which can be deduced from nature by the intellect of man. The positive—"the laid down"—rules of existing legal orders are valid and have to be applied insofar as they correspond to the higher norms of natural law. The school of natural law played a very important role in the development of international law, one which was necessary, even indispensable, to the search for a theoretical basis on which to vindicate a system of law whose existence and legal nature were far from unquestionably evident to, or generally accepted by, people living at the time. It is for this that we have to appreciate and respect the work of this school of thought.

However, it now seems unnecessary to point out that the laws of human nature and those of human societies—and more particularly the concepts formed about them—were quite different in the various periods of history. There were times when slavery and serfdom were considered to correspond to the rules of natural law, the slave trade was widely practised, and equality of the equal rights of men, not to mention the equality of races, was hardly accepted.

The natural law concept prevailing in the sixteenth and seventeenth centuries could not afford a solid basis for the inception and expansion of a real humanitarian law, but it must be said that the natural law schools of later periods manifested a great deal of flexibility and a capacity to adapt to the needs and exigencies of their times. In the new formulations of this doctrine, natural law increasingly became a set of moral norms accepted in a given age and expressing what was considered to be good and just by members of the society. In this sense, natural law theories had a great impact on international humanitarian law. Professor Jean Pictet, an eminent authority on the theory of this law, has pointed out that humanitarian law is said to be the offshoot of



natural law. However, he himself can hardly be counted among the adherents of the school of natural law, since he takes a sceptical view of the existence of that law and is willing to recognize only the notion of a higher ideal order: “*Nous définirons . . . le droit naturel, source du droit humanitaire, comme l’ensemble des droits que chaque homme revendique pour lui et qu’il est en même temps prêt à accorder aux autres.*”<sup>18</sup>

The unquestionable merit of the teachings of the natural law school—that of Vitoria, Gentili, Grotius, and others—is that it expressed and promoted the conviction that there is a law of war, a “*jus in bello*,” and that even during armed conflicts parties have to obey some particular rules of conduct. The forms of restraint that they must manifest in combat situations and the groups of persons to be protected have changed over time. To explain this, we have to go beyond the natural law concept to discover the underlying social structure, the relations between the various social classes and strata and their struggle for wealth and power. Indeed, natural law notions include a great many sociological elements, more than would generally come to mind today. What the authors of yore wrote about the sociability and companionship of perfect communities is institutionalized by the concept of interdependence and given numerical expression by the share of foreign trade in the national income. In order to give an adequate expression to the social reality underlying these concepts, we have therefore to translate the sociological elements and standpoints into the language of today’s social science. The emergence of human rights has to be explained in terms not of the law of human nature, but rather of social conditions which have raised the value of the individual.

Before sketching out some of these conditions, we have to consider another aspect of the problem. In the past, clemency was shown during military operations only to members of other human groups that belonged to the same race or community. In conflicts between political entities with similar social and economic systems and hence a number of similar features with respect to legal order and culture, adversaries showed more mercy to each other’s people and their property than did States and nations with different systems or at different levels of development. The reason was in all probability that belligerents having similar features could more easily adapt to each other’s social organization; the established order of values of the parties in conflict were identical or at least similar, so they did not strive to destroy the opponent’s existing order or change it radically. In the course of history when groups of such States constituted a “political system” (e.g., the Greek city-States or Christian States of feudal Europe), their members felt linked in solidarity in the face of attacks from outside the system. The wars waged inside

the system, judged by the standards of the period, were less destructive and less ruthless than were those waged against States and peoples outside it. But as for barbarians, aliens living outside the same system, their form of civilization had either to be annihilated or rendered harmless forever.

However, we have to guard against oversimplification. Even within one period we can find many examples of divergent practice, e.g., in the struggles between knightly troops or in the behavior of knights fighting against heretics or peasants in revolt. In accordance with the idea just discussed, these latter conflicts ought to be regarded as wars between systems, even if they took place within the boundaries of a single State; for example, peasant revolts attacked the foundations of the feudal system and were aimed at changing that system. The hatred and thirst for revenge that predominated during such wars and the accompanying misconceptions and preconceptions—i.e., subjective factors—prevented the recognition of objective interests. The attainment of rapid and decisive military success, and the seeking of momentary advantage clashed more than once with the remoter, higher interests of the State participating in the armed struggle.

The military campaigns of Genghis Khan's armies brought with them massacres and the destruction of prosperous towns and irrigation works. Such cruel methods of warfare undoubtedly contributed to their initial successes, but ultimately deprived the mongols of the fruits of their victories. The massacres and devastation impeded economic development and caused general misery, with dire consequences felt even decades and centuries later.

Generally speaking, the political systems of earlier periods were scarcely able to establish mutual contacts with other systems or their members, and they were unable to integrate them into their own system while respecting their particularities. The pre-Columbian civilizations of the Western Hemisphere were completely destroyed by Spanish colonization—to cite but one well-known example. A great deal of time and a sustained evolution were needed to attain the openness and the flexibility that enabled the international community of States (originally confined to the European continent) to become truly universal, united in diversity and integrating different nations, civilizations, and cultures.

Returning to the emergence of human rights, the most convincing explanation may be found in the social and political evolution of certain European States—first in the Low Countries and later in England and several other countries where new social structures appeared that gradually led to the abolition of feudal privileges. The burgher or commoner, in addition to his economic wealth, attained some measure of political power and influence and



tried to develop new political theories and practice. In this development, great significance has to be attributed to the intellectual current of the Enlightenment.

It would be fascinating to analyze in detail the way in which those ideas led to a radical transformation of political thinking, but the present article can mention no more than a few outstanding steps in this evolution. The Declaration of Independence of 1776 stated solemnly that:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.<sup>19</sup>

Human beings were no longer the humble and obedient servants of the ruling sovereigns but rather citizens of their States, with inalienable rights. This was the time of the first declarations of human rights on American soil, as well as on the European continent, where the French declaration of 1789 became the best known and exercised the greatest influence. The individual, with his intrinsic value and fundamental, inalienable rights, has to be respected and protected even in the midst of a war—an idea that had far-reaching consequences for the concept of the law of armed conflict.

A gradual development, confined to relations between European States, could be observed especially during the eighteenth century. The commanders in chief of the parties at war against each other began increasingly to conclude agreements for the exchange of the wounded and sick. The treatment of prisoners of war also improved. Jean-Jacques Rousseau wrote in his *Contrat Social* that:

War . . . is something that occurs not between man and man, but between States. The individuals who become involved in it are enemies only by accident. They fight not as men or even as citizens, but as soldiers; not as members of this or that national group, but as its defenders. A State can have as its enemies only other States, not men at all, seeing that there can be no true relationship between things of a different nature. . . . This principle is in harmony with that of all periods, and with the constant practice of every civilized society. . . . Even when war has been joined, the just Prince, though he may seize all public property in

enemy territory, yet respects the property and possession of individuals, and, in doing so, shows his concern for those rights on which his own laws are based. The object of war being the destruction of the enemy State, a commander has a perfect right to kill its defenders as long as their arms are in their hands: but once they have laid them down and have submitted, they cease to be enemies, or instruments employed by an enemy, and revert to the condition of men, pure and simple, over whose lives no one can any longer exercise a rightful claim.<sup>20</sup>

Equally remarkable is the assertion of the Swiss Emerich de Vattel, who says in this connection that "as soon as the enemy has been disarmed and surrendered, nobody has the right to take his life. It must be kept in mind that the prisoners of war are persons and as such they are innocent."<sup>21</sup>

The influence of these ideas on international practice is illustrated in a letter from Talleyrand, the French foreign minister, sent to Napoleon on 28 November 1806. In it he faithfully echoes Rousseau's statements:

As a consequence of the precept that war is an interrelation not between man and man but between State and State in which individuals are adversaries only by accident, the law of nations does not permit that the law of war and the right of conquest deducible from it be extended to peaceful and unarmed citizens. . . . This law, offspring of civilization, has promoted the advance of progress. To it Europe has to be grateful for the preservation and expansion of her prosperity in the midst of wars frequently occurring and dividing her.<sup>22</sup>

This practice was a logical consequence of the fact that previous wars had been fought primarily for dynastic purposes, for the maintenance or restoration of the balance of power in Europe, which did not affect the foundation of the continent's social and political order. They were all conflicts within the existing political system. It is true that Napoleon tried to transform the European community of States under the hegemony of his French Empire, but with his final defeat this community and with it the balance of power was restored.

Nonetheless, in the nineteenth century the international community of States was no longer restricted to Europe. As a consequence of the first great wave of decolonization, not only the United States in North America but also the newly independent countries of Latin America became members. The process was slow and not without difficulties and conflicts. The wave of decolonization was followed by a new period of colonization, which extended the rule of the European powers to Africa and some parts of Asia. Their technical civilization, with all its merits and faults, came gradually to conquer the globe. Nevertheless, the example was there: former colonies could



successfully attain their independence and become members of an enlarged community of States, with equal rights. The existing international system, with its manifest tendency toward globalization, transformed former conflicts between different systems into conflicts within the system. In this sense, it constituted an important step towards the universality of the international community, and it had profound consequences for the rule of law in international relations.

However, we have gone too far forward and now have to return to the mid-nineteenth century. Besides the modification of the place and role of the individual in society, and in addition to the broadening of the international community, a third important element has to be taken into consideration. This element can be defined as the awareness of the magnitude of dangers threatening both soldiers and civilians on account of the destructive power of new weapons. With regard to organization, the size of armies increased greatly. In 1066, the battle of Hastings, which decided the fate of England for centuries, was fought by between five and six thousand men on each side, and even though (as shown on the famous Bayeux tapestries) the battle must have been very ferocious, loss of life remained within tolerable bounds. In the Napoleonic wars, armies of a hundred thousand men clashed, and the numbers of dead and wounded soldiers increased accordingly. Developments in weaponry and its destructive power during the nineteenth century made the proportion of the victims of armed conflicts grow ever higher.

In 1859, at the battle of Solferino, thirty-eight thousand soldiers were killed or wounded in the course of a few hours. The majority of the wounded died for lack of proper medical care and attention. Theirs was "unnecessary suffering," because being *hors de combat* they were unable to fight against the enemy. Four years later, at Gettysburg, the best infantry divisions of the Confederacy perished under the murderous fire of Union artillery. The appearance of new destructive weapons induced governments to prohibit the use of at least some of them. In 1868, a Declaration renouncing the use in time of war of explosive projectiles under four hundred grams in weight was signed at St. Petersburg. It was followed in 1899 by the Declaration concerning asphyxiating gases and by the Declaration on expanding bullets, signed at The Hague.

I shall not continue with this list, which is long and passes through this century to our day. What I must point out, however, is that a Geneva businessman, Henri Dunant, sought an audience with Emperor Napoleon III and thereafter followed him to the theater of operations in Northern Italy. As a result he witnessed the battle at Solferino and the sufferings of the tens of thousands of soldiers lying wounded on the battlefield. It was under the

influence of this distressing experience that he wrote his work, *A Memory of Solferino*. The book had considerable impact throughout Europe. In it Dunant proposed that during peacetime relief societies should be established in all countries to support the medical services of the armed forces in time of war, and that States should conclude an international convention in support of the operation of such societies. The first proposal led to the birth of the Red Cross movement, and the second became the starting point for the first Geneva Convention. In 1864 the Swiss Federal Council convened a Diplomatic Conference which led to the signing of the first Geneva Convention on 22 August—this being a relatively short convention aimed at improving the condition of the wounded in armies in the field.

Its limited number of articles, some of which became obsolete with the passing of time (e.g., the “neutrality” of ambulances, military hospitals, and their personnel) constituted the starting point of the Geneva Law on the protection of victims of armed conflicts. Despite its shortcomings it was an initiative of historic importance and gave birth to a considerable part of the system of international law in force today. The protection of the victims of international conflicts has since 1864 raised countless problems, whose solutions have diverged in details from those originally contemplated. However, the fundamental objective of the regulation—the protection of distressed and suffering man and respect for the life and dignity of the human person—has remained the same. Moreover, it has been reinforced by the inclusion within the ambit of the Law of Geneva of situations and groups of persons that had not yet come to the fore during the previous century, or at least not with such prominence as to call for immediate regulation.

Article 9 of the Convention attained great significance:

The High Contracting Parties have agreed to communicate the present Convention with an invitation to accede thereto to Governments unable to appoint Plenipotentiaries to the International Conference at Geneva. The Protocol has accordingly been left open.

Historians of international law say that the Geneva Convention of 1864 was the first “open” treaty in international law, for it paved the way for the codification of international law and recognition of the universal validity of many of its rules.

At the same time that Henri Dunant was trying to convince the monarchs of Europe and influential citizens of Geneva of the need to endorse his ideas about helping wounded and sick soldiers, on the other side of the world, in the middle of the American Civil War, an outstanding legal expert, Francis Lieber,



systematically described the customary rules of land warfare as they were applied in Europe. Lieber's work was issued by President Abraham Lincoln, under the title "Instructions for the Government of the United States Armies in the Field" as Army General Orders No. 100. The "Lieber Code" served as a preparatory text at the Brussels Conference of 1874, convened to codify the laws and customs of warfare. The Conference did not attain this goal—the draft prepared was not adopted—but it paved the way for The Hague and contributed to the success of the 1899 Conference. Solferino and Gettysburg, Henri Dunant and Francis Lieber, Geneva Law and Hague Law, were landmarks along two different paths leading in the same direction, towards humanity in the midst of armed conflicts. Today, as mentioned above, the two are considered to be united branches of law and are referred to as international humanitarian law in the broader sense of the term.

The question we are interested in is essentially the following: how and why, and under the influence of what factors, do moral norms of a given age become legal norms? That is, how and in what manner have the humanitarian ideas aimed at the protection of suffering man become so strong that they could be promulgated in international treaties—and thereafter extended and further confirmed? What caused Henri Dunant's initiative to have such a resounding success?

The question is all the more justified because, as has been seen, humanitarian ideas were also encountered in remote ages, but these teachings of ancient philosophers and founders of religions remained mostly dead letters amidst the storm of armed conflicts.

Max Huber, then president of the International Committee of the Red Cross, in a lecture on 2 July 1939, shortly before the outbreak of World War II, raised the question of why this impact had not been felt earlier. He stated in this context that the reason—as for other historical events—was the encounter between an individual human person, a fulfilling genius, and a set of social and spiritual circumstances whose origin and nature could be analyzed and understood. The thought, he said, was metaphorically "in the air." "Democratic and socialistic ideas, beginning to gain a foothold in Europe, helped to put a higher price on human life. . . ." He was referring to the development of medical science in the care of wounded and sick persons and to the influence of a true Christian mentality which was taking shape outside the churches. Yet according to Huber, all these factors could help the humanitarian idea to victory only if appropriate personalities stood up and played their part in bringing such a victory about.<sup>23</sup>

I do not think we in any way detract from the merit of Dunant and his associates if in seeking an explanation we lay emphasis neither on the abilities of individual persons nor on irrational factors but instead on the evolution of society. It was the process of social evolution which raised the value of man ever higher while simultaneously increasing awareness of his worth. In the social formations that have succeeded one another, man has always been the most important factor in production, but it is beyond question that in the process of that evolution he has risen ever higher above the level of the other means of production. Is it necessary to insist that the free worker and peasant enjoyed a more favored place in society than did the slaves or serfs of previous ages? Naturally, one cannot simplify matters by regarding everything as always being under the total influence of economic factors and on that basis finding a direct connection between man's place in production and the humanitarian ideas of the Geneva Law. The interrelationship is too complex to be described precisely in a few lines, so as to be able to explore the sociology of international humanitarian law with convincingly exhaustive accuracy. But it would hardly be mistaken to say that a given society or State which in its own best interest develops social legislation, a system of social insurance, and which deems it to be its duty to create lives worthy of man and security for its people cannot remain indifferent to war casualties. It is of prime importance for such a society or State to reduce human losses during armed conflicts to the lowest possible level. The principal source of the well-being of nations and States is the intelligence, skill, and diligence of their citizens. Therefore, it is to them, to the totality of the individual citizens, that protection must be granted in the first place, as well as to the material goods indispensable to their existence and to their moral and cultural values. This implies a need for the protection that has so far proved most expedient and, relatively, most effective: establishing international rights and obligations through the conclusion of international conventions.

It is by no means the task of this short paper to describe the evolution of humanitarian law, but it must be stressed that as Max Huber noted in his lecture, since its first days this law has been in constant evolution. Its impact on various fields of armed conflict has grown, and the protection it has afforded has been transmitted to new categories of victims of such conflicts. The factors which promoted the birth of humanitarian law have likewise contributed to its development. The history of this branch of law is incomprehensible without taking into account the development of human rights, the universality of the international community, and last but not least, the frightening danger of new means of warfare, or rather the growing consciousness of the dangers they



represent. If one takes into account not only the legislative work but also the practical implementation of the principles and rules of the law in situations of armed conflict, it is impossible to describe the path of international humanitarian law as a continuous and straightforward movement. Yet although peace and progress have been interspersed with periods of barbarism and relapses into primitive and cruel methods of warfare, it is undeniable that there has been progress.

The Declarations of Human Rights to which reference has been made constituted only one—and by no means the last—chapter in the development of human rights. After the attainment of political and civil rights, the political struggles in many States concentrated on securing economic, social, and cultural rights—the so-called “second generation” of human rights. The various socialist movements laid special weight on those rights considered essential if all human beings are to be afforded an adequate and worthy place in society. Not only the rights to life and personal freedom but the rights to work, education, health, social security, and others were seen as necessary and fundamental to the achievement of that aim. At present, ever more is being said about a “third generation” of human rights, particularly by representatives of the Third World.

In parallel with these political campaigns there have been efforts aimed at widening protection given to victims of armed conflicts. Not only did (and do) the lives of soldiers *hors de combat* have to be protected, but so too their dignity, health, and religious beliefs. They have to be protected against humiliating and degrading treatment and against discrimination founded on sex, color, religion, and so forth. Since the adoption of the Charter of the United Nations, human rights have occupied a highly important place in international politics and legislation. Its preamble reaffirmed the faith of the United Nations in “fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women. . . .” One of the purposes of the United Nations was and is “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” Several treaties and conventions have been concluded in order to achieve this aim.

Four years after the San Francisco Conference, in 1949, the Geneva Conventions were adopted, to which—with rare exceptions—all members of the international community acceded. Instead of a single convention protecting the wounded and the sick soldiers of armies in the field, there are four Conventions. They give protection not only to victims serving in such armies but also to wounded, sick, and shipwrecked members of armed forces at

sea, while regulating the treatment of prisoners of war (beyond that of the 1929 Geneva Convention), and providing for the protection of civilian persons in time of war, first of all the civilian populations of occupied territories. If the individual human being has to be protected, the protection must be general, extended to all, and varying only according to the dangers threatening various groups of persons in time of war.

It should be pointed out that the common Article 3 of the four Conventions concerns not only victims of international armed conflicts but tries to establish rules of conduct for armed conflicts not of an international character. The second Additional Protocol of 1977 enlarged and developed those rules to a considerable extent. Since Article 2, paragraph 4, of the Charter forbids the threat or use of force in international relations, States no longer have the right to resort to war to solve their international disputes, and the regulation of other kinds of armed conflicts has come to the fore. Difficulties abound and sometimes seem almost overwhelming, but at least the world is now aware of them and has the means to deal with them.

What about the universality of the international community of States, seen as transforming all kinds of armed conflicts by bringing them inside the system? The international community now has an organized structure, in the form of the United Nations. At the San Francisco Conference of 1945, forty-nine delegations were present, and the organization was founded by fifty States. Now its membership amounts to 185, a spectacular degree of development. The development of humanitarian law has occurred more or less in parallel with the broadening of the international community.

At the first Geneva Conference, delegations of only sixteen European States were present (the United States acceded to the first Geneva convention in 1882). At the subsequent conferences, the number of the participating States grew steadily. In 1906, there were thirty-five, in 1929 forty-seven, and in 1949 fifty-nine—coming from different continents. The 1974–1977 Diplomatic Conference was attended by more than a hundred delegations. Growing numbers of participants made the conferences last longer. The first, in 1864, went on for just two weeks; the second, in 1906, for four weeks; and that of 1949, for four months. The two Protocols Additional to the 1949 Geneva Conventions had to be worked out during four sessions, lasting together over nine months. The instruments became longer and more complicated, because they had to take into account the positions of many States having different concerns and different domestic legal orders.

The threat of deployment of modern means and methods of warfare has had a consistent impact on the evolution of humanitarian law—or to be precise, an



awareness of the need to reduce their effects on the numbers of victims and their suffering. It seems superfluous to mention all the relevant examples. The armies deployed in the two world wars numbered several millions. It is well known that air warfare, and especially strategic bombing, constituted a great danger for the civilian population of the States engaged in armed conflict and that the number and proportion of civilian victims, as compared to the total number of victims, increased steadily. The first Additional Protocol of 1977 attempted, among other important objectives, to reinforce the long-standing fundamental principle of distinction between civilians and combatants, and civilian and military objectives—that is, between protected, and therefore prohibited, objects of attack and legitimate targets. There is a general hope that the rule requiring a distinction to be drawn between them will not be put to the test in the future.

Article 36 of the Additional Protocol I provides that:

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

The Protocol makes no express mention of nuclear weapons. The Diplomatic Conference of 1974–1977 did not deal with this problem, even though it was always present in the minds of the delegates. It was clear that until such time as it is solved, the legal protection of the victims of armed conflicts will remain profoundly unsatisfactory, but the delegates knew well that if it were put on the agenda of the conference, the attainment of other aims would be impaired.<sup>24</sup>

Apart from the Protocol, do the previous rules of international law applicable in armed conflicts prohibit the employment of nuclear weapons? Is international law and especially humanitarian law able to give a clear answer to this question?

The General Assembly, in Resolution 49/75K of 15 December 1994, asked the International Court of Justice to render an advisory opinion on the following question: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?” The Court, after a lengthy deliberation, rendered its opinion on 8 July 1996, and together with replies given unanimously or by large majority, stated by seven votes to seven (with the president’s casting vote) that:

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular to the principles and rules of humanitarian law;

However, in view of the current State of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.

This part of this advisory opinion has been and will be criticized for many reasons, but the framework of the present paper does not permit me to deal with the questions raised by this operative paragraph.<sup>25</sup> It is noteworthy that all the Members of the ICJ appended either a declaration, a separate opinion, or a dissenting opinion to the Advisory Opinion of the Court. The deep division of the Court generally reflects the difficulties encountered by international law when confronted by the mere existence of weapons of mass destruction for the whole of mankind—like nuclear weapons—and by the implications for the whole of mankind of any use of such weapons. This is certainly the most important and most difficult problem that humanitarian law has to solve. It is fitting then that this paper conclude with a quotation from the last operative paragraph of the Advisory Opinion of the Court :

There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

The paragraph was adopted unanimously.

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### Notes

1. GASSER, *LE DROIT INTERNATIONAL HUMANITAIRE* 17 (1993); *see also* UNESCO, *INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW* xxi (1988).
2. PLATO, *THE REPUBLIC* 499–501 (Eng. trans., vol. 1, Havard U. Pr., 1953).
3. FRANCISCO DE VITORIA, *DE INDIS ET DE JURE BELLI RELECTIONES* 267 (Nys ed., 1917).
4. GROTIUS, *DE JURE BELLI AC PACIS*, bk. III, pp. 647–49 (Eng. trans., Clarendon Pr., 1925).
5. *Id.* at 658.
6. *Id.* at 664.
7. *Id.* at 716.



8. NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 3–4 (1954); THE LAWS OF MANU 230 (Buhler trans., 1889).

9. Quoted by Grotius with reference to Valerius Maximus, in *DE JURE BELLI AC PACIS*, bk. III, ch. IV/XV, p. 462 (Amstelaedami: Apud Ioannem Blaev, 1646).

10. "... [T]o exercise clemency the barbarians selected the temples most filled with people, where they killed no one, from where they dragged out no one, where the merciful enemy brought many people in order to spare them, from where not even the most ruthless enemy could carry anyone into captivity." AUGUSTINUS, *DE CIVITATE DEI* [The City of God] 60 (Hung. transl., vol. 1, 1942).

11. NUSSBAUM, *supra* note 8, at 18.

12. G.I.A.D. Draper, *L'évolution du droit de la guerre: l'influence du christianisme et de la chevalerie*, 1965 *REVUE INTERNATIONALE DE LA CROIX-ROUGE* 1–24 (for rules of Knightly Warfare).

13. NUSSBAUM, *supra* note 8, at 26–27; Fischer, *The Sovereign Order of Malta Today*, 166 *INT'L REV. RED CROSS* 3 (1975) (for the Hospitallers).

14. Ereksoussi, *Le Coran et les Conventions Humanitaires*, 1969 *REVUE INTERNATIONALE DE LA CROIX-ROUGE* 12; Sultan, *The Islamic Concept*, in *INTERNATIONAL DIMENSIONS*, *supra* note 1, at 29–39.

15. Adachi, *The Asian Concept*, in *INTERNATIONAL DIMENSIONS*, *supra* note 1, at 13–19.

16. Ruda, *The Latin American Concept*, in *INTERNATIONAL DIMENSIONS*, *supra* note 1, at 41–58.

17. DIALLO, *TRADITIONS AFRICAINES ET DROIT HUMANITAIRE* 16 (1976) (for Diallo and others). The question is dealt with in more detail in BELLO, *AFRICAN CUSTOMARY HUMANITARIAN LAW* 157 (1980), who at the same time discusses the negative features of tribal wars in Africa. See also Ngoya, *The African Concept*, in *INTERNATIONAL DIMENSIONS*, *supra* note 1, at 5–12.

18. PICTET, *LES PRINCIPES DU DROIT INTERNATIONAL HUMANITAIRE* 14 (1966).

19. The Declaration of Independence contains some harsh words on the Indians, "whose known rule of warfare is an indistinguished destruction of all ages, sexes and conditions."

20. Rousseau, *Social Contract*, in *ESSAYS BY LOCKE, HUME AND ROUSSEAU* 249–251 (Cumberlege ed., 1947).

21. III VATTEL, *TRAITÉ DU DROIT DES GENS* 8 (1758, Eng. trans., 1916).

22. II LACOUR-GAYET, *TALLEYRAND* 200 (1930).

23. HUBER, *ROTES KREUZ: GRUNDSÄTZE UND PROBLEME* 144 (1941).

24. The United States—among others, notably the United Kingdom—declared on signature of the Protocol:

It is the understanding of the United States of America that the rules established by this protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons.

25. The International Review of the Red Cross dedicated a special number—January–February 1997—to the Advisory Opinions, with articles by outstanding experts on humanitarian law.

# XII

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## An Optimist Looks at the Law of War in the Twenty-First Century

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Howard Levie

THE TITLE OF THIS ARTICLE IS REALLY A MISNOMER, as the author is anything but optimistic that all, or even the majority, of the changes that he considers to be essential for a law-abiding world will become a part of the international law of war during the twenty-first century.<sup>1</sup> For that reason, the discussion which follows is not with respect to what the author anticipates will occur, but what he would like to see occur in order to make a better world—only rarely what he actually expects to take place.<sup>2</sup>

The twentieth century saw tremendous progress in the international effort to make war less horrendous.<sup>3</sup> Nevertheless, a number of areas remain that still require enforceable international legislation, at least some of which, one hopes, will be remedied in the forthcoming millennium. If the twenty-first century produces only a small percentage of the output of the twentieth century, the world will be a better place in which to live.

### United Nations Armed Forces

When the United Nations was brought to life in San Francisco in May 1945, Articles 42 to 49 of the Charter adopted at that time provided for the method



by which actions were to be taken by that organization, and the nature thereof, in order to maintain or restore international peace. The attempt of the Security Council to terminate hostilities in Korea by resolutions was a complete failure, as was its military intervention. At one time, it was proposed to create worldwide United Nations military forces, forces which would be large enough and sufficiently well trained and equipped to intervene and bring an end to any hostilities between nations. This proposal failed of fruition because of the insistence of the Soviet Union that such a force be commanded by a *troika*, three commanders who had to agree before any action could be taken by the United Nations Armed Force. Obviously, military hostilities cannot be conducted on such a basis, and the Military Staff Committee provided for in Article 47 of the Charter became a lifeless organ, which meets but does not act.

The basic proposal was certainly an unusual one, one which many experts believe to be impossible of creation and useless if created. Personnel would be recruited from all over the world, stationed and trained in various strategic locations, equipped to move quickly and fight wherever required to quell local conflagrations, and nonpartisan except insofar as it might be necessary to overcome an aggressor. The existence of such a world armed force would have prevented, or quickly brought to an end, many of the dozens of local wars which have occurred during the lifetime of the United Nations. Korea could have been brought to an end far more quickly and effectively had a well-trained international armed force been in existence in 1950—and had the People's Republic of China accepted the fact that it could not participate in hostilities against the United Nations Armed Force, a force which would undoubtedly have included hundreds of its citizens. The Gulf crisis would have been brought to an end in weeks instead of months had such an armed force already been in existence in August 1990.

Unfortunately, makeshift "United Nations Peacekeeping Forces" have proved of dubious value and are dependent on member nations volunteering parts of their armed forces, always a matter of delay during which the fighting gains momentum. Moreover, "peacekeeping forces" always have a limited mission—a mission frequently restricted to the relief or protection of the civilian population. What is needed is at least a try-out of the system originally contemplated, i.e., United Nations Armed Forces, the members of which are citizens of the world who remain ready to put out conflagrations between countries before they can serve the purpose of the aggressor.<sup>4</sup> However, a method would have to be devised by which this Armed Force could not be prevented from performing the function for which it was created by the veto of one member of the Security Council of the United Nations. While the entire

proposal envisaged is certainly utopian in nature, the world has much to gain and little (apart from money) to lose if it were at least to experiment with this proposal.

There is no question but that maintaining such a permanent Armed Force would be a costly project—but it would be far less costly than the endless internecine conflicts with which the world community of nations is presently plagued; its cost would probably not far exceed the cost of the frequently ineffective “peacekeeping forces.”

### Instruction in the Law of War

Unfortunately, many violations of the international law of war are committed because the perpetrator is unaware of the fact that the action which he is taking is a violation of the law of war. Many armies provide no training whatsoever in the law of war. This is frequently evidenced by the wanton killing of captured military personnel and civilians, the destruction or misuse of protected buildings such as hospitals and churches, the looting of civilian homes and shops, etc.<sup>5</sup> For their own protection, members of armed forces should be given instruction on the law of war to prevent them from unwittingly committing acts which may subsequently result in their being tried for war crimes. Few countries put a rifle in a man's hands and say, “Now you are a soldier!” There is always, as a minimum, some basic instruction in the conduct of warfare, and instruction in the law of war does not require more than a few hours of time during that basic training. Seldom do individuals knowingly and wilfully commit violations of the law of war unless it is the practice of their nation and their armed force. If every armed force gave such instruction, the number of violations of the law of war would be materially decreased and the need for trials for war crimes would be proportionately reduced.

### International Criminal Court

The war crimes trials conducted by the Supreme Court of Leipzig after World War I demonstrated that a defeated nation could not be effective in trying members of its own armed forces for war crimes alleged to have been committed by them against enemy military personnel, civilians, and property during the course of the conflict. While the great majority of war crimes cases tried after World War II were fair, they were nevertheless subject to the claim that it was a case of the “victor trying the vanquished.”



For years the international community of nations has been endeavoring to reach agreement on the creation of an international criminal court. The League of Nations created one, but it failed to receive the support of individual nations. The International Law Commission was long ago directed to draft a statute for such an organization and has finally prepared one, which is presently under discussion; a Diplomatic Conference seized with the matter is scheduled to convene in Rome in 1998. So there are grounds for anticipating that the establishment of such a court, with jurisdiction over war crimes, will become a reality during the twenty-first century. Grave breaches of the 1949 Geneva Conventions and of the 1977 Additional Protocol I are among the more important offenses listed. This would mean that a nation at war could bring charges before the International Criminal Court against enemy violators of the law of war during the course of the conflict without fear of reprisals, as retaliation would be limited to the bringing of charges before the Court against individuals by the other side. This would not be a true reprisal, because the right to bring such charges would have existed in any case.

It may well be assumed that the manner in which the International Tribunals established by the United Nations Security Council for the trials of violations of the law of war committed in the former Yugoslavia and in Rwanda perform their functions will have a major influence on whether the international community does eventually decide to establish an international criminal court. While the activities to date of those Tribunals has been far from exemplary, the present author believes that such a court will be established in the coming years. Whether States will become Parties to a convention creating it is another matter. Certainly, it can be assumed that outlaw States such as Iraq, Iran, Libya, and North Korea will not. There is also considerable doubt that such States as the People's Republic of China and the other remaining communist countries, with their closed societies, will become Parties to a convention establishing an International Criminal Court that would have jurisdiction over their nationals of all ranks for violations of specified international laws. There is even considerable doubt that the United States Senate would give its advice and consent to the ratification of a Convention establishing such a court.<sup>6</sup>

### **Protecting Powers**

Unfortunately, international wars are inevitable no matter what actions are taken to prevent them, and even if a United Nations Armed Force is established, rules must be adopted and a method devised which will compel the

participants to comply with those rules until the hostilities are brought to an end. While there were Protecting Powers acting on both sides during the Franco-Prussian War (1870–1871), for some unknown reason there were no provisions for Protecting Powers in either the 1899 or the 1907 Regulations Respecting the Laws and Customs of War on Land, even though Chapter II of both contained provisions for the humane treatment of prisoners of war. During World War I a number of agreements, both bilateral and multilateral, were entered into which provided additional protection for prisoners of war, and Protecting Powers were designated and functioned to ensure compliance with the regulations for the treatment of prisoners of war.

The 1929 Geneva Convention Relative to the Treatment of Prisoners of War attempted to remedy this defect by the addition of specific provisions calling for the designation of Protecting Powers. Article 86 of the Convention stated:

The High Contracting Parties recognize that a guarantee of the regular application of the present Convention will be found in the possibility of collaboration between the protecting Powers charged with safeguarding the interests of belligerents; in this respect, the protecting Powers may, besides their diplomatic personnel, appoint delegates from among their own nationals or the nationals of other neutral Powers. The appointment of these delegates must be subject to the approval of the belligerent with whom they exercise their mission.

Representatives of the protecting Power or its accepted delegates shall be permitted to go to any place, without exception, where prisoners of war are interned. They shall have access to all places occupied by prisoners and may interview them, as a general rule without witnesses, personally or through interpreters.

Belligerents shall so far as possible facilitate the task of representative or accepted delegates of the protecting Power. The military authorities shall be informed of their visit.

Belligerents may come to an agreement to allow persons of the same nationality as the prisoners to be permitted to take part in inspection trips.<sup>7</sup>

During World War II, almost every nation at war had Protecting Powers with every enemy country.<sup>8</sup> Nazi Germany complied with the Convention and permitted the Protecting Powers and the International Committee of the Red Cross to function in the expected manner in its camps for British and American prisoners of war, with the result that the death rate among such prisoners of war



was exceedingly low. The reverse was also true, with Protecting Powers for Germany and the International Committee of the Red Cross functioning in the prisoner-of-war camps for German prisoners of war maintained by the British and the Americans. It was only in the prisoner-of-war camps operated by the Soviet Union and the Japanese (and by the Germans for Soviet prisoners of war) that limitations on the operations of the Protecting Powers and the International Committee of the Red Cross resulted in a high mortality rate among prisoners-of-war. There were a number of war crimes trials based on violations of the law of war relating to the treatment of prisoners of war where international supervision was denied.

Articles 8 and 9 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War are very similar to, but more extensive than, the provisions of their predecessor. They provide:

Art. 8. The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from among their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.

The Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the Protecting Powers.

The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention. They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties.

Art. 9. The provisions of the Present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of prisoners of war and for their relief.<sup>9</sup>

During the hostilities in Korea, not only were there no Protecting Powers, but the North Koreans and the Chinese Communists refused to allow the delegates of the International Committee of the Red Cross to have access to their prisoner-of-war camps, thus denying any third-party supervision.<sup>10</sup> As a result, the death rate among prisoners of war was even greater than it had been

among prisoner of war held by the Japanese during World War II. The situation was identical in Vietnam. In both instances, the International Committee of the Red Cross was permitted to perform its mission only on the noncommunist side.<sup>11</sup> In the hundred or more international conflicts which have occurred since the end of World War II, the only such conflict in which it might be considered that Protecting Powers and the International Committee of the Red Cross were permitted to perform their stated functions was in the Falklands War (1982) between Argentina and Great Britain.

When the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I)<sup>12</sup> was being drafted, it was hoped that this situation with respect to Protecting Powers could be remedied by provisions which would ensure the presence of a Protecting Power, or a substitute, in every conflict. Unfortunately, as subsequent events have demonstrated, such an end has not been achieved.

Article 5(2) of the Protocol reads as follows:

From the beginning of a situation referred to in Article 1, each Party to the conflict shall without delay, designate a Protecting Power for the purpose of applying the Conventions and the present Protocol and shall, likewise without delay and for the same purpose, permit the activities of a Protecting Power which has been accepted by it as such after designation by the adverse Party.

Although the paragraph twice uses the imperative, it has proved meaningless. The next paragraph (3) of the article appears to anticipate the failure of States to comply with the provision and attempts to provide an alternative. It states:

If a Protecting Power has not been designated or accepted from the beginning of a situation referred to in Article 1, the International Committee of the Red Cross, without prejudice to the right of any other impartial humanitarian organization to do likewise, shall offer its good offices to the Parties to the conflict with a view to the designation without delay of a Protecting Power to which the Parties to the conflict consent. For that purpose it may, *inter alia*, ask each Party to provide it with a list of at least five States which that Party considers acceptable to act as Protecting Power on its behalf in relation to an adverse Party, and ask each adverse Party to provide a list of at least five States which it would accept as the Protecting Power of the first Party; these lists shall be communicated to the Committee within two weeks after the receipt of the request; it shall compare them and seek the agreement of any proposed State named on both of them.



Twenty years and dozens of conflicts later, this system, which just might possibly accomplish its purpose in some cases, has never been tried!<sup>13</sup>

The fourth paragraph of Article 5 provides that, lacking Protecting Powers, "the Parties to the conflict shall accept without delay an offer which may be made by the International Committee of the Red Cross or by any other organization which offers all guarantees of impartiality and efficacy." Again we have the imperative—and again we know (and the drafters must have known!) that there are a number of countries that will not permit the International Committee of the Red Cross or any other impartial organization to function on their territory. This means that there will be no assurance that prisoners of war are receiving humane treatment, and where there is no such assurance one can be certain that they are not receiving such treatment!

There are two alternative solutions which might have been adopted. One would have been to provide for the naming of Protecting Powers by the Security Council of the United Nations (assuming that none of them are Parties to the conflict and perhaps even then!). Inasmuch as both communists and noncommunists are represented on that body, with both sides having a veto power, it should be possible for them eventually to arrive at an agreement on a State, or States, acceptable to both sides.<sup>14</sup> Such a procedure would ensure the presence of a Protecting Power, an agency the mere presence of which ensures more humane treatment for prisoners of war.

Another, and more workable, solution was proposed many years ago at the 1949 Diplomatic Conference by the French delegation. It called for the establishment of a permanent "High International Committee for the Protection of Humanity" which could act as a Protecting Power for both sides. It was contemplated that the persons selected for membership in this organization would be of such high character that no country would have a basis for denying them the right to perform the functions of a Protecting Power should the occasion arise. It was included as a proposal in a resolution adopted by the Conference, but when the French assessed the prospects for its adoption, it received little or no support.<sup>15</sup> This is the best solution to an otherwise insoluble problem.

### **Nuclear Weapons**

Instead of pecking away at the possession of nuclear weapons by reducing the numbers allowed, numbers that even at their reduced levels could account for the deaths of millions of persons and the devastation of thousands of square miles of land, all nations, particularly those which presently possess strategic or

tactical nuclear weapons, should agree to their destruction, and steps should be taken by the United Nations to ensure that the world remains nuclear-free. This can only be accomplished by agreements prohibiting the development, production, and stockpiling of all nuclear weapons; calling for the destruction of all existing such weapons; and providing for unlimited and unannounced verification examinations, conducted by a permanent organization of trained personnel authorized to go any place in any country without advance warning to ensure that nuclear weapons are not secretly possessed or being produced.<sup>16</sup> This would also require a derogation of sovereignty, as it would be absolutely essential that the unlimited and unannounced verification examinations be conducted in *all* countries, including (perhaps particularly) those which have not agreed to be bound by the act establishing the procedure.

One must truly be an optimist to believe that obtaining such a worldwide agreement is possible. However, as the understanding of what nuclear warfare entails grows, it can be foreseen that even in countries such as Iraq, Iran, Communist China, and North Korea, to name but a few of those most likely to disregard their international commitments, the populations will eventually demand an end to this weapon which, if not made nonexistent, will one day make Earth uninhabitable. This would be particularly true in time of war, as a nation envisioning defeat would be likely to attempt to avoid that event through the use of nuclear weapons against an enemy that it knows will not be able to retaliate in kind. Moreover, in order to discourage other nations from following a similar road, it will be necessary to impose some type of punishment on the nation or nations found to have violated the prohibitions. Trade sanctions hurt the population more than they hurt the miscreant government. In contrast, limitations on the size of the armed forces and reduction in the number and nature of standard weapons allowed to be imported and possessed might be such a punishment, one which would not hurt, and might even help, the ordinary, innocent citizen.

### Bacteriological And Chemical Weapons

Although the twentieth century saw the drafting of both the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction,<sup>17</sup> and the Convention on the Prohibition of the Development, Production and Stockpiling of Chemical Weapons and on Their Destruction,<sup>18</sup> there are unfortunately nations which, even if they become Parties to these Conventions, will violate them by subterfuge and develop and produce such



weapons. Therefore, the United Nations organization of trained inspectors referred to above with respect to nuclear weapons must also have the authority to search for bacteriological and chemical weapons and ensure their destruction when found. And once again, in order to discourage other nations from following a similar road, it will be necessary to impose some type of punishment on the nation or nations found to have violated the prohibitions.

### **Antipersonnel Landmines**

It has been authoritatively estimated that there are a hundred million landmines buried all over the world, some of which date back to World War II, mines which cause half a dozen civilian casualties daily. Although Protocol II of the 1980 Convention on Prohibitions or Restriction on the Use of Certain Conventional Weapons<sup>19</sup> placed various restrictions on the use of antipersonnel landmines, they were considered inadequate. In May 1996 a much more complete Protocol was drafted with provisions that, minimally, require landmines to be capable of self-destruction or self-deactivation.<sup>20</sup> These provisions are necessary and helpful, but what is also needed is the creation and funding of an organization tasked with locating and destroying the antipersonnel mines which now lie buried throughout the world. This is being done, but at a snail's pace; meanwhile, casualties continue to occur.

There is a strong movement for the prohibition of *all* landmines. Such a movement will likely fail, because of the value of landmines for defensive purposes, their original use. Perhaps an acceptable compromise would be to allow only landmines which are triggered by a weight of several tons. This would permit their use for defensive purposes, while eliminating the presently existing danger to the innocent civilian.

### **Laser Weapons**

The laser is a new weapon which has not yet been used in combat but that exists and is available for use. Almost one hundred years ago, the nations agreed to a ban on expanding bullets, because they caused unnecessary suffering. A normal bullet would incapacitate the individual, all that was required to remove him from participation in the battle; the expanding bullet would tear his flesh and body apart, frequently causing tremendous suffering and eventually death.<sup>21</sup> The laser functions in a similar fashion, as it may cause irreversible blindness. Protocol IV to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be

Deemed to Be Excessively Injurious or to Have Indiscriminate Effects<sup>22</sup> is a first step in limiting the use of the laser as a weapon. However, it is only a small step in that direction. There is much need for a convention completely banning the use of lasers in warfare.

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Of course, the true optimist would look forward to the complete acceptance of the Kellogg-Briand Agreement, the 1928 Pact of Paris by which nations condemned recourse to war for the solution of international controversies and renounced it as an instrument of national policy. Human nature being what it is, the present author is not sufficiently optimistic to consider such a solution of the problem of war even remotely possible. He looks only for the adoption of all or some of the matters discussed above.

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Notes

1. It will be noted that throughout this article the author uses the term "law of war" rather than the term "international humanitarian law." The latter was invented by the International Committee of the Red Cross in order to avoid the use of the nasty word "war."

2. That internal wars in which practically no rules are followed will continue to occur *ad infinitum* appears inevitable. There will always be dissatisfied members of a population, and there will always be individuals who are able to become the leaders of groups of such people and who believe that they can reach their objective of superceding the existing government by the use of force and terrorism. Such individuals and such groups are not concerned with humanitarian rules governing the conduct of hostilities—they are concerned only with attaining their objectives. Some will engage in acts of terrorism, knowing that such acts will rarely assist them in attaining their objective, simply out of the need to give vent to their antagonism against their rulers.

3. Some of these international agreements were drafted as disarmament treaties. Yet if, for example, the international community outlaws bacteriological or chemical weapons, then it may draft the convention as a disarmament document, but the effect on the conduct of war is obvious.

4. The major problem would be the selection of a language for general use and teaching all of the members of the United Nations Armed Force. It should be noted that in modern international law six languages (English, French, Russian, Chinese, Spanish, and Arabic) are considered equally authentic.

5. A good example of this lack of compliance with the law of war can be found in the activities of the Zairian army, which committed many of these offenses each time it was forced to retreat by the rebel forces. In the rebel forces, strange to relate, the members appeared to have more discipline than those of the regular army. Zaire is today known as Congo.

6. A lengthy, and somewhat pessimistic, discussion of the position of the United States will be found in the BOSTON GLOBE, Aug. 17, 1997, at 1.



7. 47 Stat. 2021, 2060; 2 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES, 1776–1949, at 932, 957 (Bevans ed., 1969); 118 L.N.T.S. 343, 393, 27 AM. J. INT'L L. (Supp.) 59, 84 (1933).

8. Because of the large number of belligerents and the few nations competent to act as Protecting Powers, the functions were performed almost exclusively by Switzerland, Sweden, and Spain. While this put a heavy manpower demand on these countries, especially Switzerland, which at one time was acting as the Protecting Power for thirty-five belligerents, they all succeeded in accomplishing their missions in an able manner.

9. (1949), Arts. 8–9, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135.

10. Although North Korea had not then as yet adhered to the 1949 Geneva Conventions, it had notified the Secretary-General of the United Nations by telegram on 12 July 1950 that it was "strictly abiding by principles of Geneva Conventions in respect to Prisoners of War." 1 ICRC, CONFLIT DE CORÉE: RECUEIL DE DOCUMENTS 16 (1952).

11. In every conflict in which a communist country is involved, no other communist country would be asked to or would act as the Protecting Power for the nation in conflict with the communist country, and no noncommunist country would be allowed so to act. Hence, in conflicts in which communist countries are involved, there are never Protecting Powers and the International Committee of the Red Cross is permitted to function only on the noncommunist side. To the communists every noncommunist is a spy!

The ICRC made over 150 inspections of United Nations Command prisoner-of-war installations and hospitals during the hostilities in Korea and found only minor deficiencies, which were immediately corrected. Nonetheless, after the Armistice the Red Cross Society of China (which, unlike the Red Cross societies in other countries, is not a private organization but an arm of the government) published two voluminous reports charging the United Nations Command with numerous atrocities against Chinese prisoners of war. (Perhaps this was done on the theory that the best defense is a good offense!) Some idea of the validity of these documents may be obtained from the fact that one foreword starts with the statement, "On June 25, 1950, the U.S. government launched an aggressive war against the Democratic People's Republic of Korea."

12. 16 I.L.M. 1392 (1977); 72 AM. J. INT'L L. 457 (1978); INT'L REV. RED CROSS, Aug–Sept. 1977, at 3.

13. Had the hostilities in Korea resumed in the early Eighties (as seemed possible) and had North Korea complied with this provision of the Protocol (which would be unlikely), one could be sure that North Korea would have named its five choices from among the People's Republic of China, the Soviet Union, Czechoslovakia, Poland, and perhaps Hungary, Rumania, Bulgaria, or Cuba; certainly, none of those countries would have been on the list submitted by South Korea or the United Nations Command.

14. In the case of Korea, India, (which had introduced the Resolution establishing the Neutral Nations Repatriation Commission), was viewed by both sides as an acceptable neutral to act as the umpire between the two countries named by the United Nations Command (Switzerland and Sweden) and the two named by the North Koreans and the Chinese Communists (Czechoslovakia and Poland).

A variation to this proposal would authorize the General Assembly of the United Nations to name the Protecting Powers. Inasmuch as there would then be no veto power, this is less likely of acceptance by the remaining communist countries, particularly the People's Republic of China.

15. 2 ICRC, CONFERENCE OF GOVERNMENT EXPERTS 21 (1971).

16. Compliance with such a procedure would unquestionably be met with the claim of violation of sovereignty. It cannot be a violation of sovereignty if the State has consented.

Although it is a Party to the appropriate Convention, North Korea long refused permission for the United Nations inspection team to investigate its main nuclear plant. When it finally did so, after many months of delay, the plant was found to be in compliance with requirements—probably because during the long interim the North Koreans had moved everything violative of the Convention to another, unspecified, site. It is this type of subterfuge that it will be necessary to prevent by unscheduled inspections.

17. 26 U.S.T. 583 (1975), T.I.A.S. No. 8062, 1015 U.N.T.S. 164 (1976), 11 I.L.M. 309 (1972) .

18. The United States Senate gave its advice and consent to the ratification of this Convention on 24 April 1997. The Convention entered into force on 29 April 1997 with some seventy-five States Parties. Not unexpectedly, none of the “outlaw States” have ratified or acceded to either the Bacteriological or the Chemical convention .

19. 19 I.L.M. 1523 (1980); 21 INT’L REV. RED CROSS 19 (1981).

20. 35 I.L.M. 1206 (1996). An unusual feature of this amended Protocol is that its Article 14(2) requires each Party “to ensure the imposition of penal sanctions against persons who, in relation to an armed conflict and contrary to the provisions of this Protocol, wilfully kill or cause serious injury to civilians and to bring such persons to justice.” In December 1997 anti-personnel mines were barred completely, by the Ottawa Treaty on Antipersonnel Mines. The U.S. is not a party to this convention.

21. Actually, an army does more damage when it wounds than when it kills, because the dead body can be quickly disposed of while the wounded combatant may require the services of several individuals to care for him, individuals who might otherwise be carrying a rifle or manning a machine gun.

22. 35 I.L.M. 1218.





# XIII

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## War Crimes Law for the Twenty-First Century

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Theodor Meron

**A**LTHOUGH THE DIPLOMATIC CONFERENCE IN ROME for the establishment of an international criminal court faces many problems, advocates and scholars of international humanitarian law have good cause for some heady feelings in looking back at the groundbreaking achievements of the last few years.<sup>1</sup>

With more than twenty individuals in custody, the International Tribunal for Former Yugoslavia is no longer in danger of running out of defendants. Under international pressure, Croatia arranged for the surrender of about ten indicted Croatian nationals and Bosnian Croats to the Hague Tribunal. In addition, under the Stabilization Force (SFOR) and NATO umbrella, several indicted persons have been captured *manu militari* and brought to the Hague, and several others have surrendered to the Tribunal. Alas, most of the indicted Bosnian Serbs have yet to be arrested. The principal leaders responsible for the atrocities are thus still free, but they are forced to hide from international justice, and the possibility of their arrest remains alive.

The Hague tribunal has issued several important decisions that clarify and give judicial imprimatur to some rules of international humanitarian law. The International Tribunal for the prosecution of genocide and other violations of



international humanitarian law in Rwanda is functioning despite the problems that have plagued it during its first few years. Many of the principal indictees involved in the Rwandan genocide have been arrested and are in the Tribunal's custody. Like the Hague Tribunal, the Arusha Tribunal has rendered an important decision concerning its jurisdiction and the competence of the Security Council under Chapter VII of the United Nations Charter to establish the tribunal.<sup>2</sup> Furthermore, the Tribunal is trying several cases and should issue some judgments this year.

The work of both tribunals demonstrates that international investigations and prosecutions of persons responsible for serious violations of international humanitarian law are possible and credible. No less, the rules of procedure and evidence each has adopted now form the vital core of an international code of criminal procedure and evidence. Creating a positive environment for the creation of a standing international criminal court, which is likely to become a reality before the end of the twentieth century, these achievements have also given new vigor to universal jurisdiction and sparked the readiness of States to prosecute persons accused of serious violations of international humanitarian law.

Groundbreaking as these institutional developments are, the rapid growth of the normative principles of international humanitarian law equals them in significance. International humanitarian law has developed faster since the beginning of the atrocities in the former Yugoslavia than in the half-century since the Nuremberg tribunals and the adoption of the Geneva Conventions for the Protection of Victims of War of 12 August 1949. Appearing in 1964, Wolfgang Friedmann's important book *The Changing Structures of International Law* noted that international criminal law recognized as crimes only piracy *jure gentium* and war crimes.<sup>3</sup> Despite the potential for a more expansive vision even in 1964,<sup>4</sup> the criminal aspects of international humanitarian law remained limited and the prospects for their international enforcement poor as late as the eve of the atrocities committed in Yugoslavia.

There is of course a synergistic relationship between the statutes of the international criminal tribunals, the jurisprudence of the Hague Tribunal, the growth of customary law, its acceptance by States, and their readiness to prosecute offenders under the principle of universality of jurisdiction. The 1995 *Tadić* appeals decision of the Hague Tribunal no doubt helped in creating the environment that allowed the United States delegation to the Preparatory Committee on the Establishment of an International Criminal Court to issue, on 23 March 1998, the statement on non-international armed conflicts that I cite below.

The Statute for Yugoslavia confirms that crimes against humanity do not require a nexus with international wars, while the Statute for Rwanda extends this conclusion to peacetime situations and criminalizes serious violations of common Article 3 of the Geneva Conventions and Additional Protocol II. Following a position already made known in 1996, the United States Delegation to the Preparatory Committee on the Establishment of an International Criminal Court issued a statement on 23 March 1998, urging support for the no-nexus approach. In part, this statement declared that:

Contemporary international law makes it clear that no war nexus for crimes against humanity is required. The United States believes that crimes against humanity must be deterred in times of peace as well as in times of war and that the ICC Statute should reflect that principle.

The United States also announced robust positions—confirming its existing policy—concerning the criminalization of violations of common Article 3 for non-international armed conflicts, as well as some principles concerning the conduct of hostilities. The U.S. statement of March 23 thus pronounced that:

The United States strongly believes that serious violations of the elementary customary norms reflected in common Article 3 should be the centerpiece of the ICC's subject matter jurisdiction with regard to non-international armed conflicts. Finally, the United States urges that there should be a section . . . covering other rules regarding the conduct of hostilities in non-international armed conflicts. It is good international law, and good policy, to make serious violations of at least some fundamental rules pertaining to the conduct of hostilities in non-international armed conflicts a part of the ICC jurisdiction.

Statutes of both *ad hoc* tribunals criminalize rape as a crime against humanity. In its decisions, the Tribunal for the former Yugoslavia has already made a significant contribution to the elucidation of some general principles of criminal law, particularly duress and superior orders,<sup>5</sup> and will no doubt further clarify the concept of command responsibility. Among these decisions, I would criticize the decisions on duress in the *Erdemović* case. If, in fact, Erdemović was faced with a situation of the absence of any moral choice (i.e., he would have been killed had he refused to participate in the mass executions, in circumstances in which they would have proceeded in any event, as the decision of 5 March 1998 confirmed), I find Judge Cassese's dissent arguing for acquittal, not just mitigation of penalty, quite compelling. Indeed, a number of judgments under Control Council No. 10 recognized, in principle, the plea of duress. These judgments in effect tempered the rigidity of the black letter law of the Nuremberg Charter.



Cassese's utilitarian argument in *Erdemović* was that because the massacre would have proceeded in any event, the defendant's refusal would have benefitted no one and would have simply added one more victim. In such circumstances, Cassese argued, the law could not require Erdemović to forfeit his life. Judges McDonald and Vohrah's absolutist argument rejected any balancing of harms and rested on a categorical prohibition. Of course, McDonald and Vohrah also emphasized the policy arguments for deterring future offenders. But under their absolutist doctrine, a Jew forced to assist in operating the crematoria in Treblinka would have been denied the defense of duress. Would that be just? Of course, a person's refusal could inspire others to resist orders to kill, but in Erdemović's case such prospects appear utopian.

In the area of substantive humanitarian law, the Hague Tribunal has advanced the concept of the applicability of the Hague law to non-international armed conflicts and has made a significant contribution to an expansive reading of customary law.<sup>6</sup> Even though the jurisprudence of the Tribunal on grave breaches of the Geneva Conventions has been rather disappointing, as I show below, pending appeals still offer some hope for a change.<sup>7</sup>

Not the entire jurisprudence of the Hague Tribunal is beyond criticism. I regret, particularly, the use of *Nicaragua*'s imputability standard to classify the character of the conflict in the former Yugoslavia. Relying in this manner on *Nicaragua* was inappropriate because that case dealt with a wholly different question—whether or not the contras, for legal purposes, either constituted an organ of the United States Government or were acting on its behalf, in which case their acts could be attributed to the United States for purposes of State responsibility. As I show in greater detail elsewhere, the nexus between attribution and the character of the conflict found in *Tadić* was never present in the International Court of Justice *Nicaragua* discussion.<sup>8</sup>

Another difficulty arises from the Tribunal's interpretation of the grave breaches provisions. The Appeals Chamber's expansive interpretation that "laws or customs of war" in Article 3 of the Tribunal's Statute reach noninternational armed conflicts<sup>9</sup> largely avoided the worst possible consequences. However, the chamber refused to use Article 3 of its Statute (laws and customs of war) as a conduit to bring in conduct comprising grave breaches of the Geneva Conventions as customary law (grave breaches are the subject of Article 2 of the Statute; these can be regarded as customary law whose content parallels the pertinent provisions of these Conventions).

The grave breaches are the principal crimes under the Conventions. Deprived of the core of international criminal law in cases deemed

non-international, the Tribunal could only raise the level of actionable violence to crimes against humanity, and perhaps in the future, genocide. Not only does this handicap the Tribunal's ability to carry out its mandate, but some commentators also criticize the resort to such heavy artillery against relatively minor offenders, however evil.

For those who do not agree that the conflict is an international armed conflict, another option, proposed by Judge Georges Abi-Saab in his Separate Opinion, would be for the Tribunal to include grave breaches within the customary law it recognizes as applicable even to non-international armed conflicts.<sup>10</sup> In its amicus brief, the U.S. Government stated that persons covered by common Article 3 of the Geneva Conventions could be treated as persons protected by these Conventions.<sup>11</sup> The Tribunal's enlightened vision of the customary law pertinent to both international and noninternational armed conflicts certainly could have encompassed grave breaches of the Geneva Conventions. In addition, the authoritative Field Manual (FM) 27-10 of the U.S. Army has recognized these provisions as declaratory of customary law.<sup>12</sup>

The grave breaches provisions describe certain acts as criminal and subject the offenders to mandatory prosecution or extradition when committed against protected persons, defined in the Fourth Geneva Convention as those who find themselves in the hands of a party to the conflict of which they are not nationals. Enforcing this provision literally in the Yugoslav context, and in some other conflicts involving the disintegration of a State or political entity and the resulting struggle between peoples and ethnic groups, especially when leading to the establishment of new States, would be the height of legalism. Imagine, for example, that Israelis and Arabs in the area west of the Jordan River still had Palestinian (Mandate) nationality during the 1947–48 war. Denying those captured by an adversary in that conflict the status of protected persons under the Geneva Conventions, had they been in force, because of their shared nationality would be absurd. In many contemporary conflicts, the disintegration of States and the establishment of new ones make nationality too messy a concept on which to base the application of international humanitarian law.

In light of the protective goals of the Geneva Conventions, I support an interpretation suggesting that in situations like the one in former Yugoslavia, where the fighting was pervasive and its history as a single State resulted in one nationality, the requirement of a different nationality should simply be construed as referring to persons in the hands of an adversary. Indeed, the International Committee of the Red Cross's *Commentary* to Article 4 of the



Fourth Convention states that the reason for excluding a country's own nationals from the definition of protected persons was to avoid interfering in a State's relations with its nationals,<sup>13</sup> a concern obviously not relevant to the circumstances of the *Tadić* case, in which each ethnic group considered members of other ethnic groups as foreigners. In interpreting the law, our goal should be to avoid paralyzing the legal process as much as possible and, in the case of humanitarian conventions, to enable them to serve their protective goals.

Clarifying crimes against humanity is one of the Hague Tribunal's most important contributions. In the *Tadić* appeal, it confirmed that:

[i]t is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law. There is no question, however, that the definition of crimes against humanity adopted by the Security Council in Article 5 [of the Statute] comports with the principle of *nullum crimen sine lege*.<sup>14</sup>

Interpreting the Statute's requirement that crimes against humanity be "directed against any civilian population," the Tribunal held that the crimes must involve a course of conduct and not one particular act alone.<sup>15</sup> However, it subsequently explained that "as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity"<sup>16</sup> and that a person who commits a crime against a single victim or a small number of victims could be guilty of a crime against humanity.<sup>17</sup>

The *Tadić* judgment then reaffirmed that a "single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable."<sup>18</sup> Although crimes against humanity can only be committed against a civilian population, the Tribunal construed the term "civilian population" broadly: "[T]he presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity."<sup>19</sup> For example, civilians or resistance fighters who had laid down their arms were

considered victims of crimes against humanity in the *Vukovar Hospital Decision*.<sup>20</sup>

Finally, interpreting the United Nations Secretary-General's report on Article 5 of the Statute disjunctively, the Tribunal held that the requirement that acts be directed against a civilian population can be fulfilled if the acts are *either* widespread or systematic.<sup>21</sup> The United States proposal on the elements of crimes submitted to the Preparatory Committee on the Establishment of an International Criminal Court on 2 April 1998, takes the same approach.<sup>22</sup>

Significantly, the Tribunal held that a policy to commit crimes against humanity need not be a formal one, and that it can be inferred from the manner of the crime. Thus, evidence that "the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not,"<sup>23</sup> is sufficient. Even more importantly, the Tribunal held that this policy to commit crimes against humanity need not be a State policy. Although crimes against humanity, as crimes of a collective nature, could be committed only by States during World War II, the Tribunal considered that customary international law has evolved "to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory,"<sup>24</sup> including terrorist groups or organizations.

However, I find less persuasive the Tribunal's holding that all crimes against humanity, not only persecution, require discriminatory intent.<sup>25</sup> The Tribunal recognized that it was departing from customary law, which did not impose such a discriminatory intent requirement. There was no reason for the Tribunal to regard the more restrictive report of the UN Secretary-General<sup>26</sup> as gospel. This decision unnecessarily limits the scope of crimes against humanity, and a decision to follow the Nuremberg jurisprudence would have been better. It is important to note that in the U.S. proposal on the elements of offenses for the International Criminal Court presented to the Preparatory Committee, the requirement of discrimination is limited to those crimes against humanity that involve persecution.<sup>27</sup> It would have been better, I believe, to regard inhumane acts against a civilian population, such as murder, extermination, enslavement, or deportation, as crimes against humanity and to require discrimination only for persecutions on political, racial, and religious grounds, as in Nuremberg. I hasten to add that although I criticize some decisions of the Hague Tribunal on this point and a few others, I believe that the Tribunal and its Judges, Prosecutors, and Registrars have been very successful overall. The solid foundation they have built will now allow the international community to proceed towards the establishment of a standing international criminal court.



The Preparatory Committee on the Establishment of the International Criminal Court<sup>28</sup> has also made significant contributions that confirm and further accelerate the radical changes taking place in international humanitarian law. It has given unprecedented attention to the clarification and drafting of general principles of criminal law, including non-retroactivity, age of responsibility, statute of limitations, *actus reus*, *mens rea*, mistake of fact or law, and various grounds for excluding criminal responsibility.

Although considerable uncertainty about the final language defining the crimes within the jurisdiction of the Court still remains, the evolving texts suggest that apart from the crime of aggression, the inclusion of which in the statute is still unclear, the Court will have inherent jurisdiction over genocide, crimes against humanity, and war crimes, including grave breaches of the Geneva Conventions. The definition of the crime of genocide tracks the definitions contained in the Convention on the Prevention and Punishment of the Crime of Genocide. The section on war crimes will probably include a significant catalogue of Hague law-type provisions, and rape will probably be criminalized as a serious violation of International Humanitarian Law or grave breach, rather than only as a crime against humanity, which has a higher burden of proof.<sup>29</sup>

For non-international armed conflicts, the statute of the International Criminal Court is likely not only to confirm the criminalization of norms stated in common Article 3 but also to penalize some significant violations of Hague law-type provisions and rape.<sup>30</sup> However, there is still some opposition from a small number of States to the applicability of such crimes to non-international armed conflicts. Finally, crimes against humanity will probably encompass the the pertinent crimes in the Nuremberg Charter and possibly some forms of arbitrary detention. One of the proposals would include in crimes against humanity the causing of disappearances.

The scope of crimes under international humanitarian law now emerging from the work of the Preparatory Committee has three striking aspects. First, most governments appear ready to accept an expansive conception of customary international law without much supporting practice. Second, there is an increasing readiness to recognize that some rules of international humanitarian law once considered to involve only the responsibility of States may also be a basis for individual criminal responsibility. There are lessons to be learned here about the impact of public opinion on the formation of *opinio juris* and customary law. These developments will be further reinforced by the ICRC's study of customary rules of international humanitarian law, now in progress. It remains to be seen, however, whether the greater openness to customary law apparent during the various meetings of the Preparatory

Committee will also be present when the treaty establishing the future international criminal court is open for signature and ratification. Third, because of the probable inclusion in the Statute of Common Article 3 and crimes against humanity, the latter divorced from a war method, we are witnessing a certain blurring of international humanitarian law with human rights law, and thus a progressive criminalization of serious violations of human rights.

Another important development is the growing recognition that the elevation of many rules of international humanitarian law from the normative to the criminalized dimension creates a real need for the crimes within the jurisdiction of the International Criminal Court to be defined with the clarity, precision, and specificity required for criminal law in accordance with the principle of legality (*nullum crimen sine lege*). The U.S. proposal on the elements of offenses is a step in that direction.

These developments could not have taken place without the creation of a powerful new coalition of civil society driving further criminalization of international humanitarian law. Much like the earlier coalition that stimulated the development of both a corpus of international human rights law and the mechanisms involved in its enforcement, this new coalition includes scholars who promote and develop legal concepts and give them theoretical credibility, NGO's that provide public and political support and means of pressure, and a number of enlightened governments that spearhead law-making efforts in the United Nations.

These institutional and normative developments will, no doubt, generate further growth of universal jurisdiction. Although the offenses subject to the jurisdiction of international criminal tribunals should not be conflated with international offenses subject to national jurisdiction under the universality of jurisdiction principle, there is a clear synergy between the two, which I have already mentioned. The broader list of crimes now emerging from the Preparatory Committee will inevitably impact national laws governing crimes subject to universal jurisdiction. For this reason, the broader significance of the International Criminal Court's Statute exceeds its immediate goals.

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### Notes

\*This essay draws on my Editorial Comments, *Classification of Armed Conflict in the Former Yugoslavia*, 92 AM. J. INT'L L. 236 (1998), and *War Crimes Law Comes of Age*, 92 AM. J. INT'L L. \_\_ (1998).

1. The following articles demonstrate these developments: Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, 72 FOREIGN AFF. 122 (Summer 1993); Meron, *From Nuremberg*



to the Hague, 149 MIL. L. REV. 107 (1996); Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424 (1993); Meron, *The Normative Impact of the International Tribunal for Former Yugoslavia*, 1994 ISRAEL Y.B. ON HUMAN RIGHTS 163; Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554 (1995); Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238 (1996); Meron, *Answering for War Crimes: Lessons from the Balkans*, 76 FOREIGN AFF. 2 (Jan.-Feb. 1997).

2. Prosecutor v. Kanyabashi, Decision on Jurisdiction, Case No. ICTR-96-15-T (June 18, 1997), summarized by Virginia Morris in 92 AM. J. INT'L L. 66 (1998).

3. WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 168 (1964).

4. See generally, Theodor Meron, *Is International Law Moving Towards Criminalization?*, 9 EUR. J. INT'L L. 18 (1998).

5. Prosecutor v. Drazen Erdemović, Case No. IT-96-22-A, Appeals Judgment (Oct. 7, 1997).

6. Prosecutor v. Duško Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995) [hereinafter Interlocutory Appeal], reprinted in 35 I.L.M. 32 (1996); Meron, *Continuing Role*, *supra* note 1.

7. See Theodor Meron, *Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout*, 92 AM. J. INT'L L. 236 (1998).

8. *Id.* at 241.

9. Meron, *Continuing Role*, *supra* note 1.

10. Prosecutor v. Tadić, Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, at 5-6 (Oct. 2, 1995).

11. Amicus Curiae Brief Presented by the Government of the United States at 35-36, Motion Hearing, Prosecutor v. Tadić, Case IT-94-1-T (July 25, 1995) [hereinafter Amicus Brief].

12. U.S. DEPT OF THE ARMY, *THE LAW OF LAND WARFARE*, para. 506(b) (Field Manual 27-10, 1956).

13. INTERNATIONAL COMMITTEE OF THE RED CROSS, *GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR: COMMENTARY* 46 (Oscar M. Uhler & Henri Coursier eds., 1958).

14. Interlocutory Appeal, *supra* note 6, para. 141.

15. Prosecutor v. Duško Tadić, Case No. IT-94-1-T, Decision on the Defence Motion on the Form of the Indictment, para. 11 (Nov. 14, 1995).

16. The Prosecutor v. Mile Mrksić, Miroslav Radić and Veselin Šljivančanin, Decision of Trial Chamber I—Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case IT-95-13-R61, para. 30 (April 3, 1996) [hereinafter Vukovar Hospital Decision].

17. *Id.*

18. Prosecutor v. Duško Tadić, Case No. IT-94-1-T, para. 649 (May 7, 1997) [hereinafter Tadić].

19. *Id.*, at para. 643.

20. *Id.*, citing Vukovar Hospital Decision, *supra* note 16, para. 32.

21. Tadić, *supra* note 18, para. 646. See U.N. Doc. S/25704 (1993) para. 48.

22. A/Ac.249/1998/DP.11.

23. Tadić, *supra* note 18, para. 653.

24. *Id.*, para. 654.

25. *Id.*, paras. 650, 652.

26. U.N. Doc. S/25704, para. 48.

27. A/Ac.249/1998/DP.11 at 7.

28. See Christopher Keith Hall, *The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 91 AM. J. INT'L L. 177 (1997); Christopher Keith Hall, *The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 92 AM. J. INT'L L. 124 (1998); Christopher Keith Hall, *The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 92 AM. J. INT'L L. \_\_\_\_ (1998); *Report of the Intersessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands*, Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/AC.249/1998/L.13, Feb. 1998.

29. Theodor Meron, *Rape*, *supra* note 1.

30. See Theodor Meron, *International Criminalization*, *supra* note 1.





# XIII

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## Nongovernmental Organizations and International Humanitarian Law

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Ved Nanda

The increasing influence of nongovernmental organizations (NGOs) constitutes a significant development in contemporary international law. This development, however, does not seem to have been a dramatic departure from the past, for a recent study traces NGO influence on international governance to the late eighteenth century; it suggests a cyclical pattern in the participation of NGOs in international lawmaking—emergence (1775–1918), engagement (1919–1934), disengagement (1935–1944), formalization (1945–1949), underachievement (1950–1971), intensification (1972–1991), and empowerment (1992–?).<sup>1</sup>

It is widely acknowledged that the “intensification” period began with NGO participation in the 1972 United Nations Conference on the Human Environment in Stockholm; continued at the 1974 and 1984 UN World Population Conferences in Bucharest and Mexico City, the 1974 UN World Food Conference in Rome, the 1925 and 1985 UN Women’s Conferences in Mexico City and Nairobi, and the 1976 UN Habitat Conference in Vancouver; and culminated with the UN World Summit for Children in New York in 1990.

The “empowerment” era began with the UN Conference on Environment and Development (UNCED) in Rio de Janeiro in 1992, which attracted over



650 NGOs. A special NGO forum was convened, and NGOs were able to influence governments in the process of negotiations that resulted in the Rio Declaration, Agenda 21, and the Global Climate and Biodiversity Conventions.<sup>2</sup>

Ever since that time, the expanding role of NGOs in reaching international decision makers has become a normal feature of the international landscape. Thus, it is a valid assertion that in the recent past NGOs have played a growing role in influencing policy makers. This trend is reflected in the involvement of NGOs in World Bank decisions on development projects. NGO representatives have participated both directly and indirectly in multilateral negotiations on critical issues—human rights, environment, and trade,<sup>3</sup> for example. On the regional level, NGOs have been engaged in the process of shaping human rights.<sup>4</sup> The term “civil society” perhaps better captures the essence of what these organizations are and what they do better than “nongovernmental organization,” which has come under criticism as inadequately descriptive of their work.<sup>5</sup>

In the Vienna Declaration Programme of Action, adopted at the Vienna World Conference on Human Rights in 1993,<sup>6</sup> the contribution of NGOs was especially acknowledged:

The World Conference on Human Rights recognizes the important role of non-governmental organizations in the promotion of all human rights and in humanitarian activities at national, regional and international levels. The World Conference on Human Rights appreciates their contribution to increasing public awareness of human rights issues, to the conduct of education, training and research in this field, and to the promotion and protection of all human rights and fundamental freedoms. While recognizing that the primary responsibility for standard-setting lies with States, the Conference also appreciates the contribution of non-governmental organizations to this process. In this respect, the World Conference on Human Rights emphasizes the importance of continued dialogue and cooperation between governments and non-governmental organizations.<sup>7</sup>

Two recent examples of the extent of NGO influence in international decision making are the World Court Project and the NGO Coalition for an International Criminal Court. The World Court Project was an international citizens' initiative to obtain an advisory opinion from the International Court of Justice on the legality of the threat or use of nuclear weapons. Officially launched in 1992 by three international nongovernmental organizations, the initiative was aimed at influencing decision makers at the World Health

Organization (WHO) and the United Nations General Assembly to make the necessary request of the Court, since citizens groups are not allowed by the rules of the Court to seek such an opinion.<sup>8</sup> The Project succeeded; both the WHO and the General Assembly made requests. The second example, the NGO Coalition for an International Criminal Court, has successfully coalesced the efforts of a number of grassroots organizations and “like-minded” governments all over the world toward the establishment of an international criminal court.<sup>9</sup>

The purpose of this chapter is to study how NGOs, including the International Committee of the Red Cross (ICRC), were instrumental in influencing policy makers on two particular issues—blinding laser weapons and antipersonnel landmines. Thus the discussion will focus on NGO contributions toward the development of international humanitarian law on these topics. It should be noted that the body of international humanitarian law of armed conflict primarily consists of the series of Hague Conventions of 1899 and 1907,<sup>10</sup> the four Geneva Conventions of 1949<sup>11</sup> and their two Protocols of 1977,<sup>12</sup> and the 1980 Conventional Weapons Convention.<sup>13</sup>

The role of the ICRC in the formation, application, and monitoring of international humanitarian law is too well known to need any documentation, but I will begin with a summary of the Red Cross movement and of the development of international humanitarian law (with special emphasis on the role of the ICRC) in order to provide the appropriate historical context for an appreciation of the role of NGOs in the development of norms related to blinding laser weapons and landmines.

### The ICRC and International Humanitarian Law

The Red Cross movement began in the 1860s as a response to the publication of Henry Dunant's *A Memory of Solferino*, which recounted the dreadful experience of thousands of wounded soldiers in the aftermath of the June 1859 battle of Solferino in northern Italy during the wars of Italian independence.<sup>14</sup> With four citizens of Geneva, Dunant set up the International Standing Committee for Aid to the Wounded Soldiers, which subsequently became the International Committee of the Red Cross.<sup>15</sup> The movement today consists of several national Red Cross and Red Crescent societies, founded by the ICRC, which cooperate with the ICRC but are independent entities: the International Conference of the Red Cross; the League of Red Cross Societies; and the Research and Teaching Center of the International Red Cross, known as the Henry Dunant Institute.



The ICRC succeeded in persuading the Swiss government to convene in 1864 an international diplomatic conference, in which twelve States were represented, that resulted in the signing of the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.<sup>16</sup> Under the treaty, ambulances and military hospitals were “recognized as neutral, and as such, protected and respected by the belligerents as long as they accommodate wounded and sick;” hospital and ambulance personnel had “the benefit of the same neutrality when on duty, and while there remain any wounded to be brought in and assisted;” “wounded and sick combatants, to whatever nation they belong, shall be collected and cared for;” and “hospitals, ambulances and evacuation parties” were distinguished by a uniform flag bearing “a red cross on a white ground.”<sup>17</sup>

Subsequently, a treaty concluded in 1899 made applicable the principles of the 1864 treaty to the wounded, sick, and shipwrecked at sea; the 1864 and 1899 treaties were later revised in 1906 and 1907, respectively.<sup>18</sup> In 1920, the ICRC sent a letter to the League of Nations Assembly urging that asphyxiating gases be banned.<sup>19</sup> In 1929, after the experience of the First World War, it took the initiative and convened a diplomatic conference in Geneva at the invitation of the Swiss Government to adopt a much improved treaty on the treatment of the wounded and sick on land; it also negotiated a separate Convention on the Treatment of Prisoners of War.<sup>20</sup>

The tragedies of the Spanish Civil War and World War II led the ICRC to initiate moves further to revise and develop the earlier conventions. The Swiss government called another diplomatic conference in Geneva in 1949, the result of which was the four Geneva Conventions of 1949, for whose monitoring and application the ICRC was made responsible.

The ICRC's primary role pertaining to the 1949 Geneva Conventions is to help wounded, sick, and shipwrecked members of armed forces and also prisoners of war. Its delegates visit places of detention, internment, and work where there are captive persons; delegates approach the detaining power where appropriate and inspect the living quarters, treatment, and food of the captives; and they work toward improving the captives' conditions. In enemy territory or occupied areas, the ICRC acts on behalf of civilian populations. Under Article 3, common to all four 1949 Geneva Conventions, it also functions as a neutral intermediary in non-international armed conflicts. In such conflicts, the parties are bound to apply enumerated fundamental principles. The ICRC's Central Tracing Agency searches for missing persons and exchanges family messages between people separated by armed conflict. In

addition, the ICRC may be called upon to provide relief such as food, medicine, and clothing for civilian populations suffering from war.

The ICRC's initial purpose of providing care for sick and injured soldiers in war has remained intact. The range and scope of the ICRC's functions, however, have expanded considerably. To illustrate, under the 1949 Geneva Conventions the ICRC is given the special task of supervising criminal trials of prisoners of war in case the protecting power, a neutral State that protects prisoners of war, cannot exercise these functions. As Article 10 of the Convention on Prisoners of War provides, if the belligerent powers cannot agree on a neutral State to serve as the protecting power, "the Detaining Power shall request or shall accept . . . the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention."<sup>21</sup>

The Geneva Conventions especially mandate that signatory parties recognize and respect at all times the special position of the ICRC in its humanitarian activities of providing relief shipments to civilian internees and inhabitants of occupied territories.<sup>22</sup>

The ICRC has been vigilant in ensuring that revisions and further developments of the existing international humanitarian law instruments take place when they become necessary. Thus, in 1955 and 1956 it proposed draft rules for the protection of civilian populations against the effects of war. Its 1956 proposals included a ban on "weapons whose harmful effects, which resulted in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents, could spread to an unforeseen degree or escape . . . from the control of those who employ them. . . ." <sup>23</sup> But because of the Cold War, the proposed rules did not receive serious consideration.<sup>24</sup>

Subsequently, in 1965, the ICRC undertook to study the possible revisions to the 1949 Conventions at the 20th International Conference of the Red Cross, held in Vienna in 1965.<sup>25</sup> The Conference adopted a resolution enumerating the following principles:

- That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited.
- That it is prohibited to launch attacks against the civilian populations as such.
- That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population, to the effect that the latter be spared as much as possible.



- That the general principles of the law of war apply to nuclear and similar weapons.<sup>26</sup>

It is also important to note that on 19 December 1968 the UN General Assembly adopted a resolution inviting the Secretary-General to carry out studies for the revision of earlier conventions on international humanitarian law "in consultation with the International Committee of the Red Cross."<sup>27</sup> The resolution was in response to a resolution adopted at the International Conference on Human Rights in Tehran in April-May 1968 requesting the General Assembly to invite the Secretary-General to study steps "to secure the better application of existing humanitarian international conventions and rules in all armed conflicts" and to inquire into the "need for additional international humanitarian conventions or for possible revision of existing Conventions to ensure the better protection for civilians, prisoners of war and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare."<sup>28</sup>

In 1969, the participants at the 21st International Red Cross Conference at Istanbul<sup>29</sup> officially requested the organization to undertake the task of revising and updating the 1949 Geneva Conventions, and the ICRC legal staff initiated the preparatory work. Consultations between governments and Red Cross Societies under the auspices of the ICRC continued from 1971 to 1974. In February 1974 the government of Switzerland, which is the depositary State of the 1949 Geneva Conventions, convened a diplomatic conference to discuss the draft protocols prepared by the ICRC.

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts met in yearly sessions from 1974 to 1977. The United Nations, governments, and the ICRC participated, and the draft texts prepared by the ICRC formed the basis of deliberations and negotiations and eventually the final text that emerged. At the end of the fourth session, on 8 June 1977, delegates of 102 States adopted Protocol I relating to the Protection of Victims of International Armed Conflicts, and Protocol II relating to the Protection of Victims of Non-International Armed Conflicts.<sup>30</sup>

At the Diplomatic Conference, deliberations also began on imposing possible restrictions or prohibitions on the use of certain conventional weapons, such as napalm and other incendiary weapons, mines, or booby traps, but no conclusion was reached on this subject. Thus, the United Nations convened a special conference to address these issues. The Special Conference met in two sessions, the first in 1979 and the second in 1980. On 10 October 1980, it adopted the Convention on Prohibitions or Restrictions on the Use of

Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious Or to Have Indiscriminate Effects (the Weapons Convention), with three annexed protocols:<sup>31</sup> Protocol I, the Non-Detectable Fragments Protocol; Protocol II, the Mines Protocol; and Protocol III, the Incendiary Weapons Protocol. These Protocols regulate the use of particular types of conventional weapons considered to pose special risks of unnecessary suffering or indiscriminate effects.

The role of the ICRC in disseminating the content of international humanitarian law is also impressive. Its target groups have been primarily armed forces and combatants, national Red Cross and Red Crescent personnel, civil servants in government ministries, the academic community, primary and secondary school systems, medical professionals, journalists and the media, and the public.<sup>32</sup>

Even a summary review of international humanitarian law must include other important developments in which the ICRC was not a major player. At the outset, it should be noted that on 24 April 1863, during the Civil War, the U.S. War Department published General Orders No. 100, Instructions for the Government of Armies of the United States in the Field. Popularly known as the Lieber Code (after Francis Lieber, who prepared the historic document), it established detailed rules on land warfare for the U.S. Army.<sup>33</sup> Then the 1868 Declaration of St. Petersburg was adopted as a treaty Renouncing the Use in Time of War of Explosive Projectiles Under 400 Grammes Weight.<sup>34</sup>

Subsequently, another important development was the Hague Convention of 1899 with Respect to the Laws and Customs of War on Land, with annexed regulations and a preamble, which included the Martens Clause (named after its author, the Russian delegate de Martens).<sup>35</sup> Under this clause the parties, recognizing that they had not solved all problems, explained that it was not their intention "that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders." Thus, in such unforeseen cases, both civilians and combatants would "remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."<sup>36</sup>

In addition, in 1907 the Second Hague Peace Conference addressed questions of naval warfare and adopted conventions on this subject. Among other selected significant developments were: a naval conference held in London two years later, which adopted a Declaration Concerning the Laws of Naval War;<sup>37</sup> the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of



Warfare,<sup>38</sup> adopted in 1925 under the auspices of the League of Nations; and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict,<sup>39</sup> adopted under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO).

### **The Blinding Laser Weapons Protocol**

Two NGOs, the ICRC and Human Rights Watch, were instrumental in mounting a campaign which resulted in the adoption of the Blinding Laser Weapons Protocol annexed to the Conventional Weapons Convention.<sup>40</sup> An international review convention, begun in 1994, was aimed at particularly strengthening the Mines Protocol, earlier adopted in 1980.<sup>41</sup> However, because of the work done by these NGOs, it also considered the question of adopting a new protocol on blinding laser weapons. In May 1996 the international review process concluded with the adoption of an amended mines protocol and a new Protocol IV on Blinding Laser Weapons.<sup>42</sup> (The Protocol's provisions will be discussed below, as will the contributions of the ICRC and Human Rights Watch toward its adoption.)

Article 1 of Protocol IV prohibits the employment of "laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices." Under this article, the transfer of any such weapon to any State or non-State entity is prohibited. U.S. Secretary of State Warren Christopher reported that "[a]lthough the prospect of mass blinding was an impetus for the adoption of the Protocol, it was not the intent of the Conference to prohibit only mass blinding. Accordingly, under both the Blinding Laser Protocol and Department of Defense policy, laser weapons designed specifically to cause such permanent blindness may not be used against an individual enemy combatant."<sup>43</sup>

Under Article 2, the parties are obligated to "take all feasible precautions to avoid the incidence of permanent blindness to unenhanced vision" in the employment of laser systems other than those described in Article 1. The article adds that "[s]uch precautions shall include training of their armed forces and other practical measures." According to Secretary Christopher, this requirement is "also fully consistent with the policy of the Department of Defense which is to reduce, through training and doctrine, inadvertent injuries from the use of lasers designed for other purposes, such as range-finding, target discrimination, and communications."<sup>44</sup>

Article 3 provides that “[b]linding as an incidental or collateral effect of the legitimate military employment of laser systems, including laser systems used against optical equipment, is not covered by the prohibition of this Protocol.” Commenting on this article, Secretary Christopher said that it “reflects a recognition of the inevitability of eye injury as the result of lawful battlefield laser use. It is an important measure in avoiding war crimes allegations where injury occurs from legitimate laser uses.”<sup>45</sup>

Article 4 defines permanent blindness as “irreversible and uncorrectible loss of vision which is seriously disabling with no prospect of recovery. Serious disability is equivalent to visual acuity of less than 20/200 Snellen measured in both eyes.” According to the Secretary of State, this definition is “of sufficient precision to prevent misuse or misunderstanding of the term [permanent blindness] which is a critical element of Article 1. It is also consistent with widely accepted ophthalmological standards.”<sup>46</sup>

Under the procedures contained in the Weapons Convention, this Protocol will enter into force six months after twenty States have notified their consent to be bound. The scope of the Protocol is limited to the scope of the Convention, which extends it to international armed conflicts and to internal conflicts for “national liberation.”

The ICRC had addressed the issue of antipersonnel laser weapons at an experts meeting in 1973; many specialists considered the cost of the use of such devices to outweigh their benefits and thus were of the opinion that their use would be unlikely.<sup>47</sup>

Subsequently, at Government Experts Conferences convened by the ICRC in Lucerne (September-October 1974)<sup>48</sup> and Logano (January-February 1976),<sup>49</sup> the discussion on antipersonnel laser weapons occurred in the context of deliberations on the developments of future weapons and possible restrictions on specific weapons.<sup>50</sup> Several participating experts stated their assessment that the development of such weapons was “unlikely in the near future.”<sup>51</sup> However, the ICRC again addressed the subject at four experts meetings that it convened specifically on battlefield laser weapons between 1989 and 1991.<sup>52</sup> Sweden and Switzerland, among other nations, had raised the issue at the 25th International Conference of the Red Cross and were keen to undertake efforts to ban blinding laser weapons.

In the Prologue to the reports of the experts meetings, ICRC President Cornelio Sommaruga said that the ICRC was concerned with the effects of these weapons because of its goal to alleviate the suffering caused by armed conflicts, and that the attempt was to “supervise developments so that States may take suitable preventive action.”<sup>53</sup> In his words; “Given today’s rapid



technological developments, the widespread proliferation of weapons and the continued eruption of numerous armed conflicts, it is clear that weapons developments need to be supervised in order to try to prevent the conflicts of tomorrow wreaking even more suffering than those of today."<sup>54</sup>

Participants at these meetings included, in addition to experts on international humanitarian law, specialists in laser technology, psychiatry, ophthalmology, and military medicine. After deliberations on a wide range of aspects of the possible military use of laser technology and its physical, psychological, and medical ramifications, the discussions centered on legal and policy implications of the use of such weapons and whether the causing of permanent blindness was in violation of international humanitarian law. The ICRC concluded that blinding was more severe and debilitating than most other war injuries. Battlefield stress and post-traumatic stress syndrome were both determined to occur more frequently in persons blinded in battle.<sup>55</sup>

At the conclusion of the April 1991 meeting, several regulatory measures aimed at prohibiting the use of blinding laser weapons were identified.<sup>56</sup> Subsequently the ICRC stated that blinding as a method of warfare "is a superfluous injury and a cause of unnecessary suffering, both of which are prohibited under existing international humanitarian law."<sup>57</sup> It vigorously advocated the banning of blinding laser weapons.

Human Rights Watch was also active in undertaking studies and generating public support to ban blinding laser weapons. In May 1995 it published a report on U.S. blinding-laser weapons.<sup>58</sup> After an overview of tactical laser weapons and of the status of U.S. and foreign tactical laser weapons programs, Human Rights Watch recommended that "parties to the 1980 Conventional Weapons Convention should adopt a new protocol at the September 1995 Review Conference which would prohibit blinding as a method of warfare and ban blinding tactical laser weapons."<sup>59</sup>

In September 1995, Human Rights Watch published another study, *Blinding Laser Weapons—The Need to Ban a Cruel and Inhumane Weapon*.<sup>60</sup> It analyzed the development of tactical laser weapons programs in the United States and China,<sup>61</sup> especially noting the Chinese ZM-87 portable Laser Disturber, weighing seventy-three pounds and capable of transmitting a beam at several wavelengths.<sup>62</sup> The Chinese effort to market the ZM-87,<sup>63</sup> designed specifically to injure eyesight, was a matter of serious concern and could not have gone unnoticed by participants at the Review Conference of the 1980 Conventional Weapons Convention.

The study also discussed legal and humanitarian considerations, specifically the prohibition against unnecessary suffering and superfluous injury and the need to balance military necessity against humanitarian considerations, suggesting that

[p]ublic opinion might be more negatively affected by large numbers of blind than large numbers of dead, because the blind “would remain in view and be distressful for society.” Furthermore, the use of weapons designed to produce extreme handicaps or excessive damage have always produced unnecessary strain on peace negotiations, later peaceful relations between nations no longer at war, and societal infrastructure. Consequences to society are an important political factor in deciding whether to ban a particular weapon.<sup>64</sup>

The Human Rights Watch study analyzed the language of the Draft Protocol, which was originally proposed by Sweden, and recommended strengthening it.<sup>65</sup> It also urged that blinding as a method of warfare be prohibited.<sup>66</sup>

A detailed discussion of the application of international humanitarian law to blinding laser weapons—what constitutes “unnecessary suffering” and “superfluous injury,” the concept of proportionality, “military necessity,” and the Martens Clause is beyond the scope of this paper.<sup>67</sup> Similarly, how to construe Protocol IV, an admittedly important issue, will not be discussed here.<sup>68</sup> Nor will I review the pros and cons of the assertion that blinding as a method of warfare should have been prohibited, as suggested by the ICRC and Human Rights Watch. The Protocol only prohibits the employment of “laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness.”

The pertinent point to be stressed here is that these human rights organizations had a powerful impact upon parties to the Review Conference and were able to persuade them that in the application of international humanitarian law the social costs involved in weapons designed to cause blindness should be especially taken into account, and that blinding laser weapons should be banned.

As noted earlier, the United States was eventually convinced of the need to ban blinding laser weapons. Thus, in transmitting the Protocol on Blinding Laser Weapons to the Senate for advice and consent, President William J. Clinton said on 7 January 1997 that “[t]hese blinding lasers are not needed by our military forces. They are potential weapons for the future, and the United States is committed to preventing their emergence and use. The United States supports the adoption of this new Protocol.”<sup>69</sup>



## The Convention on Antipersonnel Landmines

A treaty banning antipersonnel landmines, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction,<sup>70</sup> was signed in Ottawa, Canada, on December 3-4, 1997.<sup>71</sup> The Convention was adopted in Oslo in September 1997 and will come into force six months after forty States have ratified it.<sup>72</sup> The UN Secretary-General is designated as the Convention's depository.<sup>73</sup> The International Campaign to Ban Landmines, comprising several NGOs, including the ICRC, Human Rights Watch, Vietnam Veterans of America Foundation, and Physicians for Human Rights, was instrumental in mounting a successful campaign which culminated in the adoption of the Convention.<sup>74</sup>

This section will first note the pertinent provisions of the Landmines Convention and will then look briefly at the two earlier efforts, Protocol II of the 1980 Conventional Weapons Convention and its amended version adopted by the Review Conference of that Convention in 1996. The concluding part will discuss the role of NGOs.

***The Provisions of the Landmines Convention.*** As the title of the Landmines Convention suggests, the treaty prohibits the use, stockpiling, production, and transfer of antipersonnel mines and mandates their destruction. In its preamble, States parties stressed "the role of public conscience in furthering the principles of humanity as evidenced by the call for a total ban of anti-personnel mines and recogniz[ed] the efforts to that end undertaken by the International Red Cross and Red Crescent Movement, the International Campaign to Ban Landmines and numerous other non-governmental organizations around the world." They also

[based] themselves on the principle of international humanitarian law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited, on the principle that prohibits the employment in armed conflicts of weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering and on the principle that a distinction must be made between civilians and combatants.

Under the Convention, States parties undertake never under any circumstances:

- a) To use anti-personnel landmines;

b) To develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines;

c) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.<sup>75</sup>

Parties undertake within four years “to destroy or ensure the destruction of all stockpiled anti-personnel mines” that they own or possess, or that are under their jurisdiction or control.<sup>76</sup> Moreover, they undertake to destroy all antipersonnel mines in mined areas under their jurisdiction or control within ten years;<sup>77</sup> to make every effort to identify, mark, and ensure the safety of landmine areas;<sup>78</sup> and to seek extension of the deadline for completing the destruction of antipersonnel mines for a period up to ten years.<sup>79</sup> The decision on extension is to be made according to set criteria and procedures.<sup>80</sup>

Consistent with earlier definitions of landmines in Protocol II and revised Protocol II, an antipersonnel mine is defined as one “designed to be exploded by the presence, proximity, or contact of a person and that will incapacitate, injure, or kill one or more persons.”<sup>81</sup>

The Convention contains detailed provisions on international cooperation and assistance. To illustrate, States parties undertake

to facilitate and . . . participate in the fullest possible exchange of equipment, material, and scientific and technological information concerning the implementation of this Convention. The States Parties shall not impose undue restrictions on the provision of mine clearance equipment and related technological information for humanitarian purposes.<sup>82</sup>

They are also to provide assistance for mine victims and a mine-awareness program,<sup>83</sup> as well as mine clearance and related activities through the UN system, international or regional organizations, NGOs, or bilaterally, or by contributing to the UN Voluntary Trust Fund for assistance in mine clearance or other regional funds set up for demining.<sup>84</sup> In addition, they are to provide assistance for the destruction of stockpiled antipersonnel mines.<sup>85</sup>

Within six months of the Convention’s entry into force, States parties are to report to the UN Secretary-General their national legal, administrative, and other measures, including penal sanctions, taken to implement the Convention within their jurisdiction or control;<sup>86</sup> the total number of all stocked antipersonnel mines and the status of programs for their destruction; and the types and quantities of the mines destroyed since the entry into force of the Convention.<sup>87</sup> Such information is to be annually updated and reported.<sup>88</sup> Among other pertinent provisions, the Secretary-General is to convene the



first meeting of the States parties within one year after the Convention's entry into force,<sup>89</sup> to be followed by annual meetings until the first Review Conference, five years after the entry into force of the Convention.<sup>90</sup> NGOs may be invited as observers.<sup>91</sup>

The Convention outlines amendment procedures, requiring a majority of the two-thirds of the States parties present and voting.<sup>92</sup> It provides for NGO attendance at amendment conferences as well,<sup>93</sup> for consultation and cooperation among States parties, and the use of the good offices of the meeting of the States parties as the means for settlement of disputes. The Convention also sets forth detailed provisions on facilitation and clarification of compliance,<sup>94</sup> prohibits reservations,<sup>95</sup> and requires a six-month notice period for a State's withdrawal.<sup>96</sup>

Though it is a much-improved document compared with the earlier attempts (as will be discussed below), one weakness of the Convention is that the enforcement provisions are not very effective. Similarly, its applicability to non-State actors should perhaps have been strengthened. However, to allow negotiations on the prohibitions of specific weapons to succeed, some compromises had to be made.

***Protocol II of the Convention on Conventional Weapons.*** As mentioned earlier, Protocol II of the 1980 Conventional Weapons Convention was an attempt to regulate antipersonnel landmines in aid of the Convention's major purpose of prohibiting the deployment and use of weapons which cause unnecessary suffering, especially to noncombatant civilians.<sup>97</sup> It did not succeed in prohibiting landmines, and the regulations it established were weak, lacking provisions for implementation and enforcement.<sup>98</sup>

The definition of landmines under the Protocol was similar to the one now contained in the 1997 Landmines Convention—"any munition placed under, on or near the ground . . . and designed to be detonated . . . by the presence, proximity, or contact of a person."<sup>99</sup> Also prohibited was the use of mines or booby traps "in all circumstances . . . in offense, defense or by way of reprisals, against the civilian population . . . or against individual civilians."<sup>100</sup>

The indiscriminate use of conventional weapons that are not directed against a military objective, or which use delivery methods that cannot be directed at specific military targets, or that when employed "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated" were outlawed.<sup>101</sup> Additionally, use of

such weapons in areas of civilian concentration was prohibited when combat has ceased in those areas or does not appear imminent.<sup>102</sup>

A major deficiency in the Protocol was that combatants were not to be liable if they issued appropriate warnings or cordoned the areas of deployment from civilian access.<sup>103</sup> Furthermore, the purpose of protecting civilians was never accomplished, although the Protocol did contain some safeguards, such as requiring the recording and publication of locations of antipersonnel mine deployment and the taking of precautions to protect civilians from the "effects of minefields, mines, and booby traps,"<sup>104</sup> providing for international cooperation in the removal of such weapons,<sup>105</sup> and recording the location of the buried conventional weapons.

Thus, at the request of States parties to the Conventional Weapons Convention, the United Nations convened a conference to review the provisions of the Convention, especially its Protocol II, the Landmine Protocol, which met in the fall of 1995 and resumed sessions in January and April-May 1996.<sup>106</sup> It should be noted that the General Assembly invited interested NGOs, especially the ICRC, to attend the Conference.<sup>107</sup>

Although the amended Protocol II did not ban antipersonnel landmines, the prior Protocol was strengthened through an agreement among the participants to impose stricter restrictions on the use, export, and production of these weapons.<sup>108</sup> The scope of its application was expanded to include internal conflicts, albeit with some limitations.<sup>109</sup> Among general restrictions, provisions concerning effective advance warnings and parties' responsibilities were added.<sup>110</sup> Thus, each party to a conflict is responsible for landmines placed by it and for their clearance, removal, destruction, or maintenance under the terms contained in the amended Protocol.<sup>111</sup> The terms are contained in Article 10. The use of certain mines, such as self-deactivating mines, equipped with an anti-handling device designed to make the mine capable of exploding after the mine ceases to function, is also prohibited,<sup>112</sup> as are mines with mechanisms specifically designed to detonate in the presence of commonly available mine detectors<sup>113</sup> and also nondetectible mines, unless their use is in compliance with the Technical Annex (2).<sup>114</sup>

The amended Protocol contained restrictions on the use of antipersonnel mines other than remotely delivered mines,<sup>115</sup> on the use of remotely delivered mines,<sup>116</sup> and on the transfer of mines.<sup>117</sup> It also contained provisions on recording and publication requirements for landmines, expanding the earlier requirements under the 1980 Protocol II.<sup>118</sup> States parties are now required to clear, remove, destroy, or maintain all minefields, mined areas, and mines.<sup>119</sup>



Among other provisions included in the amended Protocol II are those on technical cooperation and assistance,<sup>120</sup> and those for protection of all forces or missions from the effects of mines in any area under the parties' control.<sup>121</sup> States parties have also agreed on compliance procedures and consultation measures.<sup>122</sup>

Although the amended Protocol II strengthened the provisions of the 1980 Protocol II by regulating, in addition to previous limits on their use, mine transfers, and production, there was concern over the effectiveness of these regulations. The requirements that mines be manufactured with self-destruction and self-deactivation devices reduce the risk of accidental detonation by a failure in the self-destruction process, but the exceptions to the requirements still present risks.

Furthermore, the major defect in the 1980 Protocol II, relating to the indiscriminate effect of landmines, remained unresolved in that amended Protocol II allowed the use or transfer of existing mines other than nondetectable mines (which did not have to be removed for another nine years if a party could not immediately comply with the requirement to include a detectable mechanism in mines produced before January 1, 1997).<sup>123</sup> Enforcement mechanisms also remain deficient. For these reasons, the effort was begun to draft a convention to prohibit landmines.

**The NGO Contribution.** Perhaps on no other issue of public concern have NGOs achieved so spectacular a success as on the issue of banning landmines. Several studies by NGOs, especially *Landmines: A Deadly Legacy*,<sup>124</sup> *Anti-Personnel Landmines—Friend or Foe?*<sup>125</sup> and several reports on the impact of landmines in specific countries (such as Angola,<sup>126</sup> Cambodia,<sup>127</sup> El Salvador, and Nicaragua<sup>128</sup> and Iraq),<sup>129</sup> were instrumental in educating the public about the nature and gravity of the problem caused by landmines. Thus, this work set the stage for the Review Conference and—because of the NGOs' persistence—led to the eventual prohibition of antipersonnel landmines by adoption of the Landmines Convention in December 1997.

The International Campaign to Ban Landmines, which began operating in 1991 and comprised 250 groups, coordinated NGO activities.<sup>130</sup> In 1992, the Campaign issued a joint call for an international ban,<sup>131</sup> and by 1993 it had been joined by representative NGOs from several countries. Ultimately, the campaign "succeeded over fourteen months in persuading countries to join a major international treaty, a process that usually takes years."<sup>132</sup>

Canada provided leadership in what became known as the Ottawa Process. In October 1996 the Canadian government gathered representatives from

"like-minded" countries and asked them to return to Ottawa in December 1997 to sign an agreement to ban antipersonnel mines by the year 2000.<sup>133</sup>

The Conference held a "Mine Action Forum" and produced an Agenda for Mine Action, and the United Nations Development Programme announced that it envisages setting up "mine action centers" in poor countries where development is impeded because of scattered mines.<sup>134</sup> At the signing conference, government representatives and NGO experts discussed its next step, the Ottawa Process II, an initiative to obtain international commitment to furthering mine clearance, victim assistance, and rehabilitation.<sup>135</sup>

The demining process is extremely expensive, costing up to a thousand dollars per mine for removal, compared to the procedure for laying the mines in the first place. To address this financial obstacle, the United States announced it will host an international demining donor conference in May 1998; nearly \$400 million has already been donated by Norway, Japan, Canada, and the European Commission, among others, to aid in the work over the next five years.<sup>136</sup>

### Conclusion

Nongovernmental organizations have played a significant role in the efforts to ban blinding laser weapons and antipersonnel landmines. In educating the public on the crisis caused by these inhumane weapons and in influencing decision makers in many countries to agree upon conventions to prohibit these weapons, NGOs were and continue to be instrumental in ensuring that established legal tradition in which the use, production, stockpiling, and export of unjustifiably inhumane weapons is prohibited applies explicitly to these two weapons as well.

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### Notes

1. Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 183-191 (1997).

2. See generally NANDA, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* (1995).

3. The debate continues regarding the role of NGOs in the World Trade Organization (WTO), although at the December 1996 ministerial conference they were granted observer status. See Charnowitz, *supra* note 1, at nn. 851-55 and accompanying text. The WTO agreement states that its General Council "may make appropriate arrangements for consultation and co-operation with non-governmental organizations concerned with matters related to those of the WTO." Agreement Establishing the World Trade Organization, April 15, 1994, art. V(2), reprinted in 33 I.L.M. 1125, 1146 (1994).

4. See, e.g., Olz, *Non-Governmental Organizations in Regional Human Rights Systems*, 28 COLUM. HUM. RTS. L. REV. 307 (1997).

5. See Chernowitz, *supra* note 1, at 188.



6. U.N. Doc. A/CONF.157/24 (1993), *reprinted in* 32 I.L.M. 1661 (1993).
7. *Id.*, sec. 38.
8. See generally NANDA & KRIEGER, *NUCLEAR WEAPONS AND THE WORLD COURT*, ch. 5 (forthcoming 1998).
9. The General Assembly adopted the resolution by consensus confirming that the diplomatic conference to finalize the treaty establishing the court will be held in Rome from June 15 through July 17, 1998. It had accepted the draft resolution proposed by the Chairman of the Sixth Committee on the establishment of an international criminal court. U.N. Doc. A/C.6/52/L.16 (1997).
10. Especially Hague Convention No. II with Respect to the Laws and Customs of War on Land, with annexed Regulations, July 29, 1899, 32 Stat. 1803, T.S. No. 403. The series comprises many instruments. For illustration purposes, they also include: Hague Convention No. III for the Adaption to Maritime Warfare of the Principles of the Geneva Convention of August 22, 1864, July 29, 1899, 32 Stat. 1827, T.S. No. 396. Hague Convention No. II of 1899 was revised by Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539. The 1907 series also includes, among others, Hague Convention No. VIII Relative to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, 36 Stat. 2332, T.S. No. 541; Hague Convention No. IX Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351, T.S. No. 542; Hague Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, T.S. No. 540; Hague Convention No. XI Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, Oct. 18, 1907, 36 Stat. 2396, T.S. No. 544; and Hague Convention No. XIV Prohibiting the Discharge of Projectiles and Explosives From Balloons, Oct. 18, 1907, 36 Stat. 2439, T.S. No. 546.
11. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].
12. Protocols I & II Additional to the Geneva Conventions of 1949, *opened for signature* December 12, 1977, *reprinted in* 16 I.L.M. 1391, 1442 (1977) [hereinafter Protocols I, II].
13. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, U.N. Doc. A/CONF.95/15, October 27, 1980, Annex I, 19 I.L.M. 1523 (1980).
14. See KALSHOVEN, *CONSTRAINTS ON THE WAGING OF WAR* 8-9 (1987).
15. See *id.* at 9.
16. See Bory, *Origin and Development of International Humanitarian Law* 9-10 (ICRC, Nov. 1982).
17. Cited in KALSHOVEN, *supra* note 14, at 9.
18. *Id.* at 10.
19. Mirimanoff-Chilikane, *The Red Cross and Biological and Chemical Weapons*, in *A TREATISE ON INTERNATIONAL CRIMINAL LAW* 356, 357 (Bassiouni & Nanda eds., 1973).
20. See *id.* at 10.
21. Third Geneva Convention, *supra* note 11, art. 10(3).
22. Fourth Geneva Convention, *supra* note 11.

23. Draft Rules for the Limitation of the Damages Incurred By the Civilian Population in Time of War, art. 14, in *THE LAWS OF ARMED CONFLICTS* 251, 255 (Schindler & Toman eds., 3d ed. 1988).
24. See KALSHOVEN, *supra* note 14, at 21–22.
25. International Committee of the Red Cross, 20th International Red Cross Conference, Vienna (Oct. 1965).
26. *Id.*, at Resolution XXVIII.
27. KALSHOVEN, *supra* note 14, at 21.
28. *Id.* at 19–20.
29. International Committee of the Red Cross, 21st International Red Cross Conference, Istanbul (1969).
30. See generally Bory, *supra* note 16, at 14–16.
31. The Convention entered into force on December 2, 1983.
32. See Surbeck, *Conference on International Humanitarian and Human Rights Law in Non-International Armed Conflicts*, Apr. 12–13, 1983: *Dissemination of International Humanitarian Law*, 33 AM. U. L. REV. 125, 128 (1983). See also ZYS, *PRACTICAL GUIDE FOR NATIONAL SOCIETIES ON METHODS OF DISSEMINATION OF INTERNATIONAL HUMANITARIAN LAW AND THE PRINCIPLES AND IDEALS OF THE RED CROSS* (1983).
33. Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, April 24, 1863, *reprinted in THE LAW OF WAR: A DOCUMENTARY HISTORY* 161 (Friedman ed., 1972). See generally RICHARD HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* (1983).
34. Declaration Renouncing the Use, In Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29/Dec. 11, 1868, *reprinted in DOCUMENTS ON THE LAWS OF WAR* 31 (Roberts & Guelff eds., 2d ed. 1989). See also KALSHOVEN, *supra* note 14, at 12–13.
35. The Preamble to the Hague Convention IV Respecting the Laws and Customs of War on Land, *supra* note 10, contains the Martens Clause.
36. Article 1(2) of Additional Protocol I to the Geneva Conventions of August 12, 1949, contains the same principle. Additional Protocol I to the Geneva Conventions of August 12, 1949, June 8, 1977, art. 1, *supra* note 12, at 1391.
37. See KALSHOVEN, *supra* note 14, at 16.
38. See *id.* at 16–17.
39. See *id.* at 37–39.
40. Review Conference of the States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious Or to Have Indiscriminate Effects, Additional Protocol to the Convention on Prohibitions Or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious Or to Have Indiscriminate Effects, Conf. Doc. CCW/CONF.I/7 (Oct. 12, 1995).
41. For the text of the 1980 Convention and the Protocol, see U.N. Doc. A/CONF.95/15, Oct. 27, 1980, Annexes, 19 I.L.M. 1523 (1980).
42. For the text of the protocols, see 35 I.L.M. 1206 (1996).
43. Quoted in Nash Leigh, *Contemporary Practice of the United States Relating to International Law*, 91 AM. J. INT'L L. 325, 347 (1997).
44. *Id.*
45. *Id.*
46. *Id.*



47. ICRC, WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS, Report on the Work of Experts 69 (1973).

48. CONFERENCE OF GOVERNMENT EXPERTS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS (Lucerne, Sept. 24-Oct. 18, 1974): REPORT (1975).

49. CONFERENCE OF GOVERNMENT EXPERTS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS (2d Sess., Lugano: Jan. 28-Feb. 26, 1976): REPORT (1976).

50. See generally Kalshoven, *Conventional Weaponry: The Law From St. Petersburg to Lucerne and Beyond*, in ARMED CONFLICT AND THE NEW LAW 251 (Meyer ed., 1989).

51. Doswald-Beck & Cauderay, *The Development of New Anti-Personnel Weapons*, INT'L REV. OF THE RED CROSS, Nov.-Dec. 1990, at 565.

52. BLINDING WEAPONS: REPORTS OF THE MEETINGS OF EXPERTS CONVENED BY THE INTERNATIONAL COMMITTEE OF THE RED CROSS ON BATTLEFIELD LASER WEAPONS 1989-1991 (Doswald-Beck ed. 1993) [hereinafter BLINDING WEAPONS REPORTS].

53. *Id.* at 11.

54. *Id.*

55. *Id.* at 43-58, 134-39, & 179-83.

56. See generally *id.* at 353-60.

57. ICRC, BLINDING WEAPONS REPORTS 7 (1995).

58. Human Rights Watch Arms Project, United States—U.S. Blinding Laser Weapons (May 1995).

59. *Id.* at 15.

60. Human Rights Watch Arms Project, Blinding Laser Weapons—The Need to Ban a Cruel and Inhumane Weapon (Sept. 1995) [hereinafter Blinding Laser Weapons].

61. *Id.* at 7-12.

62. *Id.* at 11.

63. See Cook, *China's Laser "Blinder" Weapon for Export*, JANE'S DEF. WKLY, May 27, 1995, at 3; Arkin, *Pentagon Sees the Light*, BULL. OF ATOMIC SCIENTISTS, Nov. 1995, at 76; China Markets Blinding Laser, JANE'S INTELL. REV., June 1, 1995, at 1.

64. Blinding Laser Weapons, *supra* note 60, at 32 (footnotes omitted).

65. *Id.* at 33-34.

66. Comments on Article 1, *id.* at 33.

67. With respect to international humanitarian law, see generally PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW (1985). As to the application of international humanitarian law to blinding laser weapons, see McCall, *Blinded by the Light: International Law and the Legality of Anti-Optic Laser Weapons*, 30 CORNELL INT'L L.J. 1, 21-36 (1997); Peters, *Blinding Laser Weapons: New Limits on the Technology of Warfare*, 18 LOY. L.A. INT'L & COMP. L.J. 733, 744-53 (1996).

68. See, e.g., Carnehan, *Unnecessary Suffering, the Red Cross and Tactical Laser Weapons*, 18 LOY. L.A. INT'L & COMP. L.J. 705, 731 (1996):

By declaring the undefined concept of "blinding as a method of warfare" unlawful and making exaggerated claims for the destructiveness of lasers, the ICRC has helped to lay the basis for false war crime charges against any soldier captured with a portable laser. . . .

Protocol IV, like any Treaty, should . . . be applied in good faith, in accordance with the ordinary meaning of its terms. . . . As part of the law of war, Protocol IV is penal legislation and should be carefully construed to give reasonable notice of the exact prohibited behavior. Improper application may result in unfair war crimes prosecution of prisoners of war captured with legitimate target-marking or range-finding lasers.

Assessing the legality of weapons under the rule against unnecessary suffering and superfluous injury requires a balancing of military utility against anticipated injuries. Human Rights organizations, including the ICRC, are singularly ill-equipped to assess the military aspect of this equation.

But see *supra* notes 57-60 and accompanying text; McCall, *supra* note 67; Peters, *supra* note 67.

69. S. TREATY DOC. NO. 105-1, at IV (1997), cited in Nash Leigh, *supra* note 43, at 326.

70. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, <<http://www.vvaf.org/landmines/us/updates/events97/treaty9 29.html>> [hereinafter Landmines Convention].

71. See *Big Names Missing From Landmine Treaty Signed in Ottawa*, JANE'S DEF. WKLY, Dec. 10, 1997, at 4; *Landmine Ban. Happyish Days*, THE ECONOMIST, Dec. 6, 1997, at 48 [hereafter ECONOMIST].

72. Landmines Convention, *supra* note 70, art. 17(1).

73. *Id.* art. 21.

74. See Priest, *U.S. Activist Receives Nobel Peace Prize for Landmine Campaign*, WASH. POST, Oct. 11, 1997, at A1; HUMAN RIGHTS WATCH & PHYSICIANS FOR HUMAN RIGHTS, *LANDMINES: A DEADLY LEGACY* xi (1993) [hereinafter DEADLY LEGACY].

75. Landmines Convention, *supra* note 70, art. 1(1).

76. *Id.*, arts. 1(2), 4.

77. *Id.*, art. 5(1).

78. *Id.*, art. 5(2).

79. *Id.*, art. 5(3).

80. *Id.*, art. 5(4).

81. *Id.*, art. 2(1).

82. *Id.*, art. 6(2).

83. *Id.*, art. 6(3).

84. *Id.*, art. 6(4).

85. *Id.*, art. 6(5).

86. *Id.*, arts. 7, 9.

87. *Id.*, art. 7.

88. *Id.*

89. *Id.*, art. 11(2).

90. *Id.*, arts. 11(2), 12.

91. *Id.*, art. 11(4).

92. *Id.*, art. 13.

93. *Id.*, art. 13(2).

94. *Id.*, art. 8.

95. *Id.*, art. 19.

96. *Id.*, art. 20.

97. U.N. Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons: Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps, and Other Devices (Protocol II), April 10, 1981, 19 I.L.M. 1523, 1530 (1980) [hereinafter Protocol II].

98. See generally Anderson & Schurtman, *The United Nations Response to the Crisis of Landmines in the Developing World*, 36 HARV. INT'L L.J. 359 (1995); Smith, *A Plea for the Total Ban of Landmines By International Treaty*, 17 LOY. L.A. INT'L & COMP. L.J. 507 (1995); and Eckberg, Note: *Remotely Delivered Landmines and International Law*, 33 COLUM. J. TRANSNAT'L L. 149 (1995).

99. Protocol II, *supra* note 97, art. 2(1).



100. *Id.*, art. 3(3).
101. *Id.*
102. *Id.*, art. 4(2).
103. *Id.*, art. 4(2)(b).
104. *Id.*, art. 7(3).
105. *Id.*, art. 9.
106. See Final Report, Review Conference of the States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious Or to Have Indiscriminate Effects, U.N. Doc. CCW/CONF.I/16, at 1 (1996) [hereinafter Final Report].
107. *Id.* at 4.
108. *Id.* at 11. See generally Petrarca, *An Impetus of Human Wreckage? The 1996 Amended Landmine Protocol*, 27 CAL. W. INT'L L.J. 205 (1996); Owsley, *Landmines and Human Rights: Holding Producers Accountable*, 21 SYRACUSE J. INT'L L. & COM. 203 (1995).
109. Final Report, *supra* note 106, at 14–16, Annex B.
110. *Id.* at 16–17, Annex B, art. 3.
111. *Id.*, art. 3(2).
112. *Id.*, art. 3(6).
113. *Id.*, art. 3(5).
114. *Id.* at 18, art. 4.
115. *Id.* at 18, art. 5.
116. *Id.* at 19, art. 6.
117. *Id.* at 20, art. 8.
118. *Id.* at 28, Technical Annex 1.
119. *Id.* at 22, art. 10.
120. *Id.* at 22, art. 11.
121. *Id.* at 23–24, art. 12.
122. *Id.* at 26–27, arts. 13–14.
123. *Id.* at 29, Tech. Annex 2(b)–2(c).
124. DEADLY LEGACY, *supra* note 74.
125. INTERNATIONAL COMMITTEE OF THE RED CROSS, ANTI-PERSONNEL LANDMINES—FRIEND OR FOE? A STUDY OF THE MILITARY USE AND EFFECTIVENESS OF ANTI-PERSONNEL MINES (1996).
126. See AFRICA WATCH, LANDMINES IN ANGOLA (1993).
127. See ASIA WATCH, LANDMINES IN CAMBODIA: THE COWARD'S WAR (1991).
128. See AMERICAS WATCH, LANDMINES IN EL SALVADOR AND NICARAGUA: THE CIVILIAN VICTIMS (1996).
129. See MIDDLE EAST WATCH, HIDDEN DEATH: LANDMINES AND CIVILIAN CASUALTIES IN IRAQI KURDISTAN (1992).
130. See DEADLY LEGACY, *supra* note 74, at xi.
131. See Priest, *supra* note 74.
132. *Id.*
133. See *Legislation and the Landmine*, JANE'S INTELLIGENCE REV. SPECIAL REPORT, Dec. 1, 1997, at 3.
134. See ECONOMIST, *supra* note 71.
135. See *Big Names Missing*, *supra* note 71.
136. See *id.*; *Landmine Detector*, NEW SCIENTIST, Dec. 6, 1997, at 5; ECONOMIST, *supra* note 71.

# XIV

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## Implementation of the Laws of War in Late-Twentieth-Century Conflicts

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Adam Roberts

THE QUESTION OF HOW TO RESPOND to violations of the laws of armed conflict has been a key issue in international relations and in the politics of many countries in the 1980s and 1990s. In a development that involves risks as well as advantages, States have increasingly looked to international institutions, especially the United Nations, to address questions of enforcement. The main arguments of this paper are that:

- The formal mechanisms of implementation provided for in the treaties have for the most part not been effective;
- The United Nations has assumed a more important role in implementation than in any previous period and has been allocated further such roles in various treaties;
- Despite the growth of the UN's role, States and alliances remain essential, if flawed, agencies of implementation and enforcement; and
- Enforcement of this body of law can take many and varied forms: international trials are only one of them, and not necessarily the most effective.



The body of law under discussion here has increasingly come to be termed “international humanitarian law.” This is a fashionable but flawed contemporary reincarnation of the older term “laws of war,” which continues to have merits, and which I have preferred in this paper. To imply that the ethical basis and underlying character of the law is exclusively humanitarian and international may be attractive to some, but it may also dent the credibility of the law among those in governments and armed forces who have to implement it.

Because the focus here is on responses to violations, a critically important aspect of implementation is not discussed, namely, the regular internal processes by which States—in peacetime as much as in war—bring their own law, policy, and practice into line with the laws of war, educate the public on their content, and train their armed forces accordingly. Rather, the focus here is what happens when there are violations.

Five considerations help to explain why, arising from the conflicts of the 1980s and 1990s, the subject of implementation and enforcement of the laws of war has been so central and difficult an issue in international diplomacy.

First, the scale and frequency of serious infractions of existing rules have been greater than in earlier decades. There have been violations of basic rules by many belligerents, State and non-State, including:

- Iraq’s use of chemical weapons during the Iran-Iraq War (1980-1988), and its wanton destruction of property and mistreatment of prisoners following its seizure of Kuwait (1990-1991);
- Somali factions’ persistent interference with relief efforts and attacks on civilians, especially in 1992-1994;
- Systematic attacks on civilian populations and cruelty to detainees in the conflicts in former Yugoslavia that started in June 1991;
- Genocidal practices in Rwanda in 1994; and
- The widespread use of antipersonnel land mines in ways which conflict with fundamental principles of the laws of war and cause huge casualties (mainly of civilians) during and especially after wars.

Second, some (but not all) of the atrocities of the 1980s and 1990s have been in conflicts with at least some element of civil war. Such wars are often more bitter than international wars: they frequently involve deliberate targeting of civilians and a winner-takes-all mentality. Getting parties in such wars to act in any kind of disciplined manner has always been difficult.

The rules formally and indisputably applicable to civil wars are relatively few. They include the 1948 Genocide Convention; the 1949 Geneva Conventions, common Article 3; and the 1977 Additional Protocol II. Two major agreements on land mines, neither of them yet in force at the time of writing, also encompass civil war situations as well as international war. These are the 1996 Amended Protocol II of the 1981 Convention on Specific Conventional Weapons, which places restrictions on the use of land-mines,<sup>1</sup> and the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction.<sup>2</sup>

These rules applicable to internal conflicts, although they seek to prohibit many of the atrocities of the type that have occurred, are more limited than those for international armed conflicts. Various attempts have been made to get over this problem. In the cases of former Yugoslavia and Rwanda, the UN Security Council has proclaimed or implied the applicability of a wide range of rules of humanitarian law, thus seeking to reduce somewhat the significance of the question of whether a particular conflict, or aspects thereof, is to be deemed internal or international. However, the main difficulty in many civil wars is not so much one of extending the range of applicable rules but rather (as discussed next) of getting parties to observe even the most minimal restraints.

Third, in many of the atrocities of recent years (and other cases could be added to the litany of frightfulness) it has not been a serious problem to establish what the law is, or even what the facts of the particular case are. Nor has the critical issue generally been whether in individual cases a State (or non-State) party concerned has acceded to particular treaties or has indicated adherence in some other way, or is bound anyway, with or without its explicit consent, by basic customary rules. The most critical issue—which affects many key international decisions yet to be made, including over Bosnia—has been what to do when, despite the existence of rules and the clearest possible warnings that they must be implemented, States and non-State bodies persistently violate them and then refuse to investigate and punish those responsible.

Fourth, from the time of the Iran-Iraq War the UN Security Council has acquired a major role in the implementation of the laws of war. Although the United Nations as a wartime alliance had been involved in war crimes issues, this expanded role was not foreseen in the UN Charter, and it has involved moving into uncharted territory. In the 1990s the Security Council has been particularly preoccupied with war crimes in conflicts involving Iraq, Yugoslavia, Somalia, and Rwanda. In addition, several arms control and laws-of-war treaties have progressively increased the UN's roles in enforcement matters.



Fifth, the UN, and the Western powers in particular, have faced harsh choices about the extent to which they should pursue the war crimes issue in the post-ceasefire phase of two major conflicts, namely the Gulf in 1991, and Bosnia and Herzegovina in 1995. They faced similar issues in Somalia in 1993-1994, when the question was posed in the form of what to do about General Mohammed Farah Aideed, and in many other conflicts. The role that legal prosecution for war crimes, and the pursuit of compensation for victims, can and should have in the larger process of peacemaking has proved to be as tangled an issue in the 1990s as in previous eras.

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There is nothing new in recognizing that the problem of implementation of the laws of war is both important and difficult.<sup>3</sup> However, with rare exceptions it has not been the subject of a vigorous tradition of thought. Many lawyers, and others, like to think of enforcement exclusively in terms of criminal trial after a violation. However, implementation may take many other legal, administrative, or military forms.

Analysis of the question of implementation can benefit from a more descriptive approach, looking systematically at the many difficulties, and opportunities, that have been encountered in applying the laws of war. Such an approach employs the methodologies not only of law but also of history, politics, international relations, and strategic studies.<sup>4</sup> The major single-author work along such lines, Geoffrey Best's examination of whether or not the body of law governing armed conflicts has worked well since the Second World War, reaches pessimistic conclusions. He draws a picture of a body of law with an impressive and admirable superstructure built on insecure foundations, of which perhaps the shakiest is the central, critical distinction between the soldier and the civilian. The law's impact has been much less than had been hoped. Sometimes, indeed, it has been little more than an instrument of propaganda warfare.<sup>5</sup> My own conclusions, only slightly less pessimistic than those of Professor Best, are more narrowly concentrated on the question of implementation in the wake of violations, and they reflect developments up to the end of January 1998.<sup>6</sup>

### **The Various Forms and Mechanisms of Implementation**

What induces parties to armed conflicts to observe certain rules of restraint? The 1992 German triservice military manual lists no less than thirteen factors,

mainly treaty based, that “can induce the parties to a conflict to counteract disobedience of the law applicable in armed conflicts and thus to enforce observance of international humanitarian law”: consideration for public opinion, reciprocal interests of the parties to the conflict, maintenance of discipline, fear of reprisals, penal and disciplinary measures, fear of payment of compensation, activities of protecting powers, international fact-finding, the activities of the International Committee of the Red Cross (ICRC), diplomatic activities, national implementing measures, dissemination of humanitarian law, and the personal conviction and responsibility of the individual.<sup>7</sup>

While this list is admirably broad, it is not complete. It does not describe the wide range of “national implementing measures” that may be attempted, especially national commissions of inquiry (discussed further below). Moreover, it does not include as distinct factors either the implementation roles of the United Nations, or the possibility that violations could lead to multilateral military action being initiated against the violators. Events in Somalia in late 1992, and in Bosnia and Herzegovina in 1995, confirm that multilateral military action may be triggered by violations, and may be among the many ways in which the UN and other multilateral bodies can get involved in enforcement.

*Some Provisions of International Legal Agreements.* The 1899 and 1907 Hague Conventions on Land War, and the Regulations annexed to them, are imprecise on the matter of ensuring compliance. Article 1 of the 1899 and 1907 Hague Conventions requires the powers to issue instructions to their land forces in conformity with the Regulations. Article 3 of the 1907 Convention says that a belligerent party violating the Regulations “shall, if the case demands, be liable to pay compensation.” In addition, Article 56 of the 1899 and 1907 Hague Regulations makes a vague reference to legal proceedings in the event of violation of its rules about certain types of public property.<sup>8</sup> Nothing more is said about how these or other provisions are to be enforced. The many striking omissions regarding enforcement exposed the Hague system to the accusation that it was based on unduly optimistic assumptions.

However, the relative paucity of formal provisions in the Hague Conventions and Regulations did not mean that there was no implementation system at all. The central assumption, of which the above-summarized provisions are a mere reflection, was of a responsibility on States to ensure that the rules were observed and offenders brought to justice. This assumption has many weaknesses, of which the most obvious—easy to identify but hard to remedy—is that most governments have been, quite understandably, reluctant



to prosecute their own servants in cases where their violations of the laws of war were carried out while pursuing government policy. It is this problem above all which has sustained an unbroken series of calls for some diminution of national sovereignty so far as the punishment of war crimes and crimes against humanity is concerned.

In the post-1945 period there have been many efforts to devise formal international legal provisions regarding implementation. Many of those that have been adopted in treaty form have in practice been ignored or sidestepped. For example, the system outlined in the 1949 Geneva Conventions of using the institution of Protecting Powers to supervise and implement the Conventions' provisions has not been widely used; and States have observed unevenly their duty to ensure that all those suspected of grave breaches are tried.

There have also been problems with the body established under the 1977 Geneva Protocol I with the specific purpose of investigating violations. Article 90 of that treaty provides for the establishment on a permanent basis, with periodic elections, of an International Fact-Finding Commission to:

- (i) Enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol;
- (ii) Facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol.

The International Humanitarian Fact-Finding Commission was duly set up in June 1991, and became operational in July 1992. Yet not a single one of the numerous problems between then and now has been referred to it. In the delicate words of its president, the Commission has been trying "to draw the international community's attention to its availability."<sup>9</sup> It has tried in vain for well over five years.

The relevance of the Fact-Finding Commission is called into question by the development, explored further below, that in the years since the Commission was established the UN Security Council has developed *ad hoc* mechanisms for investigating and taking action regarding violations, most notably in connection with the wars in the former Yugoslavia and Rwanda. For a variety of perfectly good reasons, States prefer these *ad hoc* arrangements to the ones they negotiated so laboriously at Geneva.

Other formal legal provisions regarding implementation have been the basis for a wide range of subsequent practice that has gone further than was envisaged when the provisions were originally concluded. Although the ICRC's role is limited in certain obvious ways and it has consistently refused to

assist prosecutions by providing evidence, some aspects of its role as a body with important rights of initiative, and duties to oversee some aspects of implementation, have built upon what is in the conventions. It has, for example, made a number of public statements about violations.<sup>10</sup> Even more significantly, the modest treaty provisions for the UN to have a role in implementation, summarized later in this paper, have been accompanied by an increase in UN practice.

One much-publicized legal basis of the increased interest of States and international bodies in enforcement has been the interpretation placed on the words of common Article 1 of the 1949 Geneva Conventions. This article calls on States "to ensure respect for the present Convention in all circumstances." This provision has been widely seen as implying a universal obligation of States (and therefore of regional and global international organizations as well) to see to implementation wherever problems arose.<sup>11</sup> However, the evidence is compelling that Article 1 was not originally intended to mean this.<sup>12</sup> Whatever the original intention behind it, the interpretation of common Article 1 as implying a duty to promote implementation generally has helped to bring the question of implementation of the laws of war more centrally into the discourse of States and the activities of international organizations. States are indeed at liberty to interpret, or rather reinterpret, their obligations under Article 1 in this way.

**Criminal Trials.** Trials are commonly seen as the major mode of securing implementation of the laws of war. The main conventions since 1945 provide for them as one key mode of enforcement. Trials, particularly before specially constituted international war crimes tribunals, are the focus of practically all public discussion of the war crimes issue. The international tribunals at Nuremberg, Tokyo, and now The Hague and Arusha, are sometimes seen as the main means of bringing offenders to book; while at the same time they are criticized by their detractors on various grounds, not least because their very establishment is deemed to show how selective, even biased, the international community is in handling this issue.

The overwhelming majority of legal cases in connection with the laws of war have in fact been in national, not international, courts.<sup>13</sup> Such trials often attract less attention than international ones, even when they are major events involving large numbers of suspects, as with the trials of former officials of the deposed Dergue military junta that have been held in Ethiopia since December 1994.<sup>14</sup> Many national trials may not appear to be about war crimes cases at all but rather about violations of national law or military discipline, but they are



nonetheless based on the same standards as those of international law governing armed conflict.

Formal legal cases, whether national or international, have some inherent limitations. The use of trial procedures is dependent on the potential defendants being, or being forcibly brought, within a jurisdiction which is prepared to see them prosecuted: this is by no means always possible. In addition, the use of legal procedures against a few individuals to deal with transgressions of norms is often debatable in cases in which offenses are committed in what is perceived as a public cause, and in which large numbers of people are involved in the offenses in different ways and at different levels of authority. Even in apparently quite simple episodes unrelated to war there is often extreme reluctance to establish individual responsibility: hence, the shocking failure in the United Kingdom to find any individual responsible for what was authoritatively viewed as the criminal negligence that caused the March 1987 Zeebrugge ferry disaster.

***Human Rights Law, and the Right to Individual Redress.*** In the past, one of the many side effects of the inter-State character of the laws of war was a complete absence of formal procedures for individual legal redress. If violations occurred, it was for governments to take action: the individual may have been the object of the law but was not in any meaningful sense its subject. This situation has begun to change. Under several national and regional legal systems, including those of Israel, Japan, the United States, and Europe, there has been a growing tendency for individuals to bring issues arising from armed conflicts and occupations before the courts. This is mainly, but not exclusively, because of the development of human rights law.<sup>15</sup>

Various international human rights instruments allow scope for individual redress, whether through a right of individual petition or complaint, or through the right to bring cases. Some have involved the right to life. Although the right to life is inevitably subject to certain limitations in times of war and insurgency, its existence can potentially provide a basis for those whose rights have been undermined (or their surviving relatives) to argue that an armed force acted recklessly, granted its obligations. This was the basis of the claims, in the case of *McCann and Others v. The United Kingdom*, which followed the British Special Air Service killing of three Irish suspects in Gibraltar on 6 March 1988. The European Court of Human Rights, in its judgment delivered on 27 September 1995, found that there had been a breach of the European Convention on Human Rights, Article 2, on the right to life; however, it dismissed the applicants' claim for damages because the three people killed had been preparing

an explosion. The British government, in its instant and touchy reaction to this judgment, showed itself notably hostile to the whole idea of UK military actions in a long and difficult conflict being subject to European court decisions.<sup>16</sup>

**Compensation.** The inherent limitations of, and sensitivities surrounding, trials and certain other court procedures may help to explain the occasional recourse to one other means of responding to violations: compensation. Compensation for violations of the laws of war is an ancient institution, and as noted above, it was reflected in the provisions of the 1907 Hague Convention on land war. It frequently merges into the broader concept of war reparations—i.e., charges imposed on the losing side in a war, usually linked to that side's alleged responsibility for the outbreak of the war in the first place. In such form, reparations are of course linked more to *jus ad bellum* (the law governing resort to armed force) than to *jus in bello* (the law applicable in armed conflict). One possible attraction of arrangements for compensation and reparations is that they can be arranged in State-to-State negotiations and do not leave the eventual outcome to the numerous hazards associated with criminal court proceedings. In the aftermath of the 1990-1991 Gulf conflict, the United Nations Compensation Commission (whose work is briefly outlined later in this paper) has pursued the path of compensation on an astonishing and unprecedented scale. Neither in the Iraqi case nor more generally are reparations and compensation necessarily an alternative to war crimes trials. Both paths can be pursued simultaneously, as they were in respect of Germany (disastrously) in the 1919 Treaty of Versailles at the end of the First World War.

**National Commissions of Inquiry.** Although many treaties and manuals on the subject recognize that the laws of war are implemented not transnationally but by individual countries, they seldom set out in detail the exact mechanisms by which such implementation is to be achieved. It is in fact through government decisions, laws, courts and courts-martial, commissions of inquiry, military manuals, rules of engagement, and training and educational systems that the provisions of international law have a bearing on the conduct of armed forces and individuals.

National commissions of inquiry are nowhere mentioned in the treaties on the laws of war, and very seldom in legal texts on this branch of law.<sup>17</sup> Yet they have in fact been one of the principal means of trying to bring practice into conformity with law. Three examples indicate possible roles of such inquiries.

- On Northern Ireland in 1972, Lord Gardiner's minority report (which was accepted by the Government) to the Parker Committee report on the



interrogation methods used there was an interesting example of asserting the wider relevance, even in an internal conflict, of certain international legal standards, including some from the main body of the four 1949 Geneva Conventions.<sup>18</sup>

- Following the massacres of Palestinians at Sabra and Shatilla camps in Beirut in September 1982, it was an Israeli official report which helped establish the facts surrounding these events and reminded Israel that certain well-established standards had to apply not only to the actions of the Israel Defence Forces but also to those locally based paramilitary forces operating in conjunction with them.<sup>19</sup>

- In Canada, a wide range of actions followed violations of basic norms (including norms of the law of war) by Canadian forces while on UN-authorized operations in Somalia in 1992–1993. In 1993–1994 there were numerous courts-martial of Canadian soldiers involved in the Somalia operations; there was a military Board of Inquiry into these events. An entire battalion-sized force, the Canadian Airborne Regiment, was disbanded on 5 March 1995, principally because some of its members had been involved in crimes in Somalia. Finally, there was an official Commission of Inquiry, which issued a highly critical report in 1997.<sup>20</sup>

Commissions of inquiry have their limitations. They naturally tend to reflect national preoccupations and perspectives. Curiously, in all these three cases the terms of reference of the inquiry did not specifically identify violation of international treaties as a question to be addressed. For whatever reasons, the issue was often framed in terms of violations of ethical standards, of institutional procedures, and of national law. Such concerns often overlap with those of the laws governing armed conflict, and certainly they did so in these instances.

In societies emerging from periods of civil war or dictatorship, there are many possible variations on the commission of inquiry format: for example, the wide variety of truth and reconciliation commissions, or such other forms of coping with the past as opening of official files, in countries as different as former East Germany, South Africa, Argentina, and Chile.<sup>21</sup> Despite the variety of their formats and their undoubted limitations, there are merits in what might be termed the “commission of inquiry approach”: it enables national perspectives to be understood, it allows for more extensive and at the same time nuanced attributions of responsibility than is the case with criminal procedures, and above all it can open the way to critically important changes in government policy and social attitudes.

**Controls Over Careers of Individuals.** There have been many examples of the use of administrative methods of various kinds, not necessarily involving criminal trials, to punish or limit the influence of those who have been involved in war crimes or related acts. In occupied Germany after 1945, the Allies rapidly lost enthusiasm for criminal prosecutions, and thousands of cases were not pursued: the “denazification programme” was a preferred if still flawed administrative substitute. Within many armed forces, an individual who has been involved in questionable practices may suffer a blighted career or may be denied the honors which would otherwise be due. A typical case was the decision announced in Buenos Aires on 27 January 1998 to strip Captain Alfredo Astiz of his rank of retired captain, his uniform and his navy pension: he had been an officer in Argentina’s “dirty war” in the 1970s who had continued to defend the horrors of that period.

**Other Acts of Individual Countries, Regional Organizations and Alliances.** Even where efforts are made to get international enforcement following a systematic pattern of violations by one or more unrepentant belligerents—to get a foreign State or armed force to comply with the rules—the actions of individual governments and regional bodies have often been important and have often taken a form other than trials.

**Diplomatic and Economic Pressures.** From the late 1980s onwards member States of the European Community made protests to Israel regarding its policies in the occupied territories, and suspended or delayed ratification of trade agreements.<sup>22</sup>

**Formation of a Military Coalition Against the Offending State.** Sometimes illegal conduct by a belligerent, including the commission of atrocities, may contribute to the formation of an international military coalition against the offending State, and it may influence the coalition’s willingness to use force. Such conduct has been a significant element in the building of many coalitions, including the anti-Axis alliance in the Second World War, the international coalition against Iraq in 1990-1991, the multinational intervention in Somalia in December 1992, and the decision by NATO and the UN to initiate Operation DELIBERATE FORCE in Bosnia-Herzegovina on 30 August 1995. Even the possibility that such a process of illegal conduct may assist coalition building is almost entirely neglected in the legal literature, except in the rather specialized context of discussions of “humanitarian intervention.” The way in which violations can assist coalition building constitutes a little-recognized but important link between *jus in bello* and *jus ad bellum*.



**Reprisals by an Adversary.** A reprisal may be defined as a coercive retaliatory measure, normally contrary to international law, taken in retaliation by one party to a conflict with the specific purpose of making an adversary desist from particular actions violating international law. It may be intended, for example, to make the adversary abandon an unlawful practice of warfare.<sup>23</sup>

On occasion the threat or actuality of reprisals can be an important means of inducing restraint and securing implementation of the laws of war. There is evidence that fear of reprisals played some part in the non-use of chemical weapons by various belligerents in the Second World War;<sup>24</sup> and by Iraq in the 1991 Gulf War.<sup>25</sup> Thus the threat of retaliation in kind has in many cases helped to buttress the 1925 Geneva Protocol regime. It has only been where that threat was absent, because the victim State lacked any capacity to threaten retaliation in kind, that chemical weapons have been employed.

A threat of reprisals was implicit in the reservations made by States when they originally acceded to the 1925 Geneva Protocol prohibiting use of gas and bacteriological methods of warfare. At least thirty States parties (including many major powers, not least all five that became permanent members of the UN Security Council) specified that the Protocol would cease to be binding in regard to any enemy State whose armed forces fail to respect the prohibitions laid down in the Protocol.

This more or less explicit reliance on reprisals as one basis of the 1925 Geneva Protocol regime is under challenge. This is partly because of general doubts about their utility. It is also because the adoption in 1972 of the Biological Weapons Convention, prohibiting possession (not just use) of biological weapons, undermined the credibility of threats of retaliation in kind, as did the ongoing negotiations which led eventually to the 1993 Chemical Weapons Convention. This helps to explain why since 1972 eleven of the thirty-plus States that had made reservations safeguarding this right of reprisal have withdrawn these reservations.<sup>26</sup> In 1991 two other States, Canada and the United Kingdom, made more qualified and limited withdrawals of their reservations, retracting them only insofar as they relate to recourse to bacteriological methods of warfare.<sup>27</sup>

Despite their utility, reprisals can sometimes be little more than a fig leaf thinly disguising States' resort to unrestrained warfare. They have been heavily criticized. In international legal agreements there has been a strong tendency to limit or even prohibit their use. The 1977 Additional Protocol I prohibits certain types of reprisal.<sup>28</sup> At ratification of this agreement, a number of States made declarations which, in interpreting some of its provisions, appeared to keep open the possibility of reprisals. The clearest such cases are Italy's in 1986,

Germany's in 1991, and the United Kingdom's in 1998. Italy's long statement of interpretation included the following: "Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means admissible under international law in order to prevent any further violation." Germany's declaration on this point was virtually identical. The UK statement regarding Articles 51-55 asserted in considerable detail a qualified right of reprisal.<sup>29</sup> Thus, the institution of the reprisal, although by no means generally accepted in international society, is not yet dead. If it were to fall completely into disuse, the question would inevitably be raised as to what the sanction underlying the laws of war is to be, if it is not reprisals by belligerent States.

### The Implementation Roles of the United Nations

The United Nations has developed, or been given, a wide range of roles in implementation of the laws of war.<sup>30</sup> These include General Assembly and Security Council resolutions; monitoring and investigative work by the Secretary-General and by other UN bodies; decisions of the International Court of Justice; authorization of certain uses of force to repress violations; the creation of the international tribunals for former Yugoslavia and Rwanda; and work aimed at the creation of an International Criminal Court. The travails of the main UN bodies in passing an unending stream of resolutions critical of Israeli conduct in the occupied territories are evidence that these are not easy issues for the UN to grasp.

*Treaty Provisions for UN Involvement in Implementation.* There was reference to the UN in several laws of war treaties concluded before 1980, always in connection with the problem of implementation.<sup>31</sup> Subsequent treaties in the laws of war and related fields add to the UN's involvement in this difficult area.

*The 1993 Chemical Weapons Convention* is first and foremost a prohibition of manufacture and possession of such weapons, not just of use, and thus belongs more in the category of arms control than laws of war.<sup>32</sup> This treaty has been seen as overcoming a perceived weakness of the 1925 Geneva Protocol, namely, that it prohibited use but not possession. However, there is a risk that the Chemical Weapons Convention could actually weaken the prohibition on the use of chemical weapons. This is because it leaves some uncertainty about the sanction that would be employed in the event of violations. Instead of relying on the threat of retaliation, Article XII of the 1993 treaty provides for



the application of collective measures by States Parties, including, in cases of particular gravity, bringing the issue to the attention of the UN General Assembly and Security Council. Whether this will prove effective in practice remains to be seen.

*The 1994 Convention on the Safety of UN and Associated Personnel* (again, only to a limited extent a laws of war agreement) covers not only peacekeeping troops but also humanitarian workers with, for example, a nongovernmental organization (NGO) or a specialized agency, provided they are part of an operation under UN authority and control. It involves the UN as well as its member States in all aspects of the implementation of the convention, "particularly in any case where the host State is unable itself to take the required measures."<sup>33</sup>

*The 1996 Amended Protocol II* (on land mines), annexed to the 1981 Convention on Specific Conventional Weapons, makes brief reference to the United Nations in its Article 14, which deals with compliance. Also in Article 12 it obliges parties to provide protection for, *inter alia*, UN fact-finding missions.<sup>34</sup>

*The 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*, which is a laws of war treaty to the extent that it institutes a complete prohibition on use of this class of weapon, again involves the UN extensively in compliance issues, mainly in the detailed provisions of Articles 6-8 and 11-12.<sup>35</sup>

These treaty provisions place a heavy burden on the UN, especially the Security Council. Whether UN bodies will be able to respond effectively remains to be seen, especially in view of their well-known weaknesses in getting prompt agreement on controversial issues, and then getting any agreement that is reached effectively implemented. In any case, the importance of these treaty provisions should not be exaggerated. Much of the actual increase of UN action in relation to the laws of war has not arisen because of them, but because of a general tendency of States to look to UN bodies for interpretation, monitoring and enforcement.

***The International Court of Justice.*** The International Court of Justice (ICJ) at The Hague has long had certain limited roles in respect of implementation of the laws of war. There are specific references to the ICJ in the 1948 Genocide Convention<sup>36</sup> and the 1954 Hague Cultural Property Convention.<sup>37</sup> However, the Court's Statute, with its built-in limitations on what type of cases may be brought to it and by whom, is likely to allow it to look only at a minority of issues concerning the laws of war.

Many cases brought before it have involved key laws of war matters: for example, the *Corfu Channel Case* in 1949;<sup>38</sup> *Nicaragua v. USA* in 1986;<sup>39</sup> and the 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*.<sup>40</sup> The first two cases involved the principle that a State laying mines at sea is obliged to give notification of their location in order to protect the security of peaceful shipping. The third case led to an opinion which, though cautious, did clarify, or publicize, the dubious legality of almost any actual use of nuclear weapons.

Many cases have involved issues analogous, and potentially relevant, to laws of war problems. The *United States Diplomatic and Consular Staff in Tehran* case concerned the treatment of individuals under the protection of international law in an emergency situation.<sup>41</sup> The *Frontier Dispute (Burkina Faso/Mali)* case raised the question of interim measures of protection.<sup>42</sup> The 1971 Advisory Opinion on *Namibia* involved several germane matters, including the use of a sanction: termination of a League/UN mandate as a response to failures to observe certain rules of restraint.<sup>43</sup>

In Bosnia and Herzegovina's action against the Federal Republic of Yugoslavia (Serbia and Montenegro), *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the ICJ has been asked to declare Yugoslavia in violation of a wide range of legal provisions. In September 1993 the Court ordered interim measures, requiring Yugoslavia to do all in its power to prevent genocide. Any effect of this order was limited. This case is currently proceeding slowly.

In many of these cases on which it has reached decisions, the ICJ has performed a useful service by clarifying the content of the laws of war and their application to particular and often complex circumstances, and by publicizing fundamental principles which should inform the policy making of States in matters relating to the use of force. However, there are limits to what the ICJ can be expected to achieve. Many States are reluctant to let cases concerning their own survival be settled by a distant conclave in The Hague. There are doubts about the capacity of the court to reach satisfactory conclusions on contentious factual matters. In an emergency situation, aggrieved States may also worry about the slowness of some (but certainly not all) of its proceedings. When it is asked to comment in a general way on complex issues which are bones of contention among statesmen and lawyers—as in the nuclear weapons case—the Court's decision may not be found universally persuasive. Above all, the ICJ is not a criminal court, and its unavoidable lack of capacity to try individuals for violations is one of the considerations that has fed the growing demand for the establishment of an International Criminal Court.



## UN Attempts to Secure Implementation in Some Conflicts of the 1990s

Since the early 1980s the UN Security Council has had a particularly important role in implementation matters. It has issued countless pleas to belligerents to observe the laws of war, investigated violations (Iran-Iraq War), authorized a military intervention one of whose purposes was to restore respect for humanitarian law (Somalia), authorized a major use of force in response to attacks on "safe areas" (Bosnia-Herzegovina), and set up international tribunals (former Yugoslavia and Rwanda).

This deep involvement of the UN in implementation raises an issue of wider significance: that international law is commonly said to be weak law because it lacks any central enforcement mechanism. The UN Security Council has been increasingly seen as potentially constituting just such a mechanism—and at least as much for implementation of the laws of war as of any other area of law.

Yet the UN's involvement in implementation has been extremely selective. The UN Security Council has not sought to secure implementation of the law in all conflicts whose termination it has assisted. For example, the long war in Mozambique after independence in 1975 involved many atrocities, yet the peace settlement of 1992 was not made contingent on legal trials of those involved. Likewise the settlement in Cambodia under the 1991 Paris agreements did not involve any systematic accounting for past crimes, although these had been on a vast scale. The peace accords in Guatemala in 1994-1996, although they did include a "commitment against impunity" (which had distinctly limited impact), did not establish any specific mechanism for punishing the crimes committed in the decades-long civil war.<sup>44</sup>

In three conflicts in the 1990s—those involving Kuwait, former Yugoslavia, and Rwanda—the United Nations became heavily involved in attempts to secure implementation of the laws of war, and some striking innovations resulted. A brief examination of these cases may suggest some strengths and weaknesses of the UN's approaches to the problems of implementation.

***The Conflict Over Kuwait, 1990-1991.*** After Iraq occupied Kuwait in 1990, Security Council Resolution 674 of 29 October 1990 invited States to collect information on Iraqi violations of international humanitarian law. However, with the suspension of military activities on 28 February 1991 the coalition governments suddenly became quiet on the subject of the responsibility of Saddam Hussein and colleagues for major war crimes. This was despite the fact that Iraq had added to its crimes the torture of coalition prisoners of war and the wanton despoilation of Kuwait. The Security Council passed many

resolutions on the cease-fire, reparations, and the dismantling of Iraq's capability for chemical warfare; one of these, Resolution 687 of 3 April 1991, is its longest ever. Yet nothing was said on the subject of personal responsibility for war crimes. Similarly, in less than three months after the cessation of hostilities some sixty-four thousand Iraqi prisoners of war were repatriated without any attempt to sift out those suspected of war crimes—a process which might have delayed repatriation by years.

There were genuine difficulties in pursuing the war crimes issue. First and foremost, Saddam Hussein would have been difficult to arrest even had the coalition military action had more offensive-minded goals. After the end of hostilities, it would have been awkward to call for his arrest as a war criminal while at the same time negotiating cease-fire terms with his government. Further, outside powers were reluctant to press for trials if local powers would not join them in doing this. There were hazards in limiting trials to the conflict of 1990-1991, as the Iraqi regime had engaged in criminal activities externally and internally both before and after that episode.

However, the failure to take any action against the Iraqi leaders exposed a serious problem regarding the laws of war, namely, the difficulty of securing enforcement even after clear evidence of violations. The Pentagon ended its *Final Report* pointedly: "A strategy should be developed to respond to Iraqi violations of the law of war, to make clear that a price will be paid for such violations, and to deter future violators."<sup>45</sup> The United States did prepare a little-noted war crimes report in 1992, which was issued without fanfare by the UN in March 1993.<sup>46</sup> The net outcome is that Iraqi leaders might face trial if they show their faces in Western States—but not necessarily in, say, Amman, as in the case of Hussein Kamel in 1995-1996.<sup>47</sup>

The UN has gone down another path, which was also signposted in the laws of war: compensation. The United Nations Compensation Commission, set up under the terms of Security Council resolution 692 of 20 May 1991, is based on the principle that Iraq is internationally responsible for its unlawful acts, mainly under the *jus ad bellum*, but not excluding considerations of *jus in bello*.<sup>48</sup> By the January 1997 deadline, 2.6 million claims had been filed for a total of approximately U.S. \$250 billion. Initially, the only funds available to the Compensation Commission came from the partial liquidation of Iraq's assets abroad.<sup>49</sup> Then, under the "food for oil" program agreed with Iraq in a memorandum signed on 20 May 1996 and implemented in 1997, 30 percent of the proceeds from Iraqi oil sales went to the compensation fund. By the end of 1997 the UN Compensation Commission had paid out \$726 million in partial or complete payment of several hundred thousand claims.<sup>50</sup>



The approach of seeking financial redress on the basis of State responsibility has some obvious advantages: matters can be settled in negotiations between States, sometimes fairly quickly. However, as the case of Iraq suggests, to hold a country as a whole liable for the costs of a war is intensely problematic. It is likely to involve a whole population in paying for offenses committed by a minority among them. The process of payment may drag out for decades and cause dangerous political resentments against those imposing the penalties. If submitting a few individuals to trial and punishment seems dangerously selective when a larger number may be responsible, punishing the whole population over a long period is open to the accusation of being indiscriminate.

*The Former Yugoslavia Since 1991.* The international community could scarcely have faced a more difficult challenge than seeing to the implementation and enforcement of the laws of war in the conflicts that raged in Croatia and Bosnia-Herzegovina in 1991-1995. These wars being about attempts at creating States out of ethnically complex republics, a principal purpose of certain belligerents was to achieve an object which itself necessarily involves violations of the laws of war: expulsions of populations and their replacement by other populations. Major States and international organizations had only limited involvement, and therefore only limited means of exerting pressure on the belligerents.

From early on, outside bodies, including particularly the UN Security Council, asserted the applicability of rules governing international armed conflict and pressed belligerents to comply with their obligations under humanitarian law.<sup>51</sup> This pattern of activity constituted a moral escalator on which entreaties had to be followed by action of some kind. Thus the London Conference on the former Yugoslavia of 26-27 August 1992—a joint EC and UN initiative—decided to “take all possible legal action to bring to account those responsible for committing or ordering grave breaches of international humanitarian law.” Security Council Resolution 780 of 6 October 1992 asked the Secretary-General to establish an impartial Commission of Experts to examine evidence of grave breaches of international humanitarian law. Then in decisions of February and May 1993 the Council set up the International Tribunal for the Former Yugoslavia.

The process was influenced by the political and moral pressure, strong in many countries, to do *something* about Yugoslavia, and by lack of agreement as to what else could be done. At that time in 1993 the international community was conspicuously unable to agree on any major intervention or other decisive action, and the Tribunal was one of the few options left. The pressure to

establish it was reinforced by the fact that the local States and non-State entities could not be trusted to put their criminals on trial; indeed in some cases they were headed by criminals.

The Tribunal, under the guidance of Judge Antonio Cassese as President, made significant progress in establishing itself and embarking on its difficult task. Particular care was given to drawing up Rules of Procedure and Evidence, dealing as they do with sensitive matters on which national systems offer very different models. The first contested trial, that of Duško Tadić, a Bosnian Serb, started in The Hague in May 1996. On 7 May 1997 he was found guilty of crimes against humanity (on six counts) and of violations of the laws of war (on five counts). On 14 July 1997 he was sentenced to imprisonment for twenty years. An appeal is pending. Tadić was not a remotely senior figure in the Bosnian Serb hierarchy; the case confirmed that there is bound to be an element of happenstance as to who can actually be brought to The Hague for trial.

It was obvious from the start that achievement of the goals for which the Tribunal was established might be blocked by several factors, including: (1) the probable need, in efforts to end the war, to deal politically with the very people who might be wanted for war crimes; (2) the difficulty of getting suspects arrested and brought to The Hague; and (3) the difficulty of getting witnesses to give evidence and of ensuring their safety both before and after. Thus, the Tribunal could only hope to operate effectively if there were political changes in the region favorable to its operation or if sufficient pressure were exerted on the States and other political entities in the region to induce them to cooperate.

In 1993 the Security Council had sought to justify the setting up of the Tribunal largely in terms of its short and medium-term effects, in relation to the ongoing conflict and the restoration of peace:

[T]he establishment of an international tribunal would bring about the achievement of the aim of putting an end to such crimes and of taking effective measures to bring to justice the persons responsible for them, and would contribute to the restoration and maintenance of peace.<sup>52</sup>

These arguments are serious. In particular, the argument that peace requires that justice be done contains persuasive elements. If all Serbs, or Croats, are deemed equally guilty in an undifferentiated way, that is a recipe for unending conflict. Attaching guilt to individuals can help lay the foundations for reconciliation and political reconstruction. However, there is reason to doubt whether the existence of the International Criminal Tribunal achieved the first



aim outlined by the Security Council, namely, the ending of such crimes during the war; also, the contribution of the Tribunal to the second aim, the restoration of peace, has proved problematical.

A major question raised sharply by events in Yugoslavia is: should UN peacekeeping forces gather information about war crimes and arrest suspects? A similar question arose for the personnel of the Office of the High Commissioner for Refugees (UNHCR) and other agencies, for UN Human Rights Action Teams, and for European Union monitors.<sup>53</sup> In the case of UNPROFOR (the UN peacekeeping force that witnessed many atrocities in Croatia and in Bosnia), insofar as a clear answer emerged, it appears to have been that information on violations may be recorded and passed on, including by some national contingents through their own national authorities. However, it was not a formal part of the UNPROFOR mandate to arrest suspected war criminals and hand them over for possible trial. Sometimes UN peacekeepers were passive onlookers at atrocities. This was particularly so at Srebrenica at the time of its capture by Bosnian Serb forces in July 1995. There was ample evidence that UNPROFOR in general, and the Dutch forces who had the misfortune to be in place at the time, knew of atrocities committed against Muslim men and did little. There have also been press suggestions that the governments of Britain, the United States, and the Netherlands sought to play down the massacre.<sup>54</sup>

One means of dealing with violations of the laws of war in the former Yugoslavia was the threat and use of force by NATO in conjunction with the UN. Several NATO military operations were specifically justified as responses to attacks on civilians, including the two major attacks on the market place in Sarajevo: the first such attack, on 5 February 1994, led to the creation of the Sarajevo exclusion zone; the second, on 28 August 1995, led to NATO's bombing campaign, Operation DELIBERATE FORCE. This NATO campaign was also influenced crucially by the Srebrenica massacre of July 1995, which strongly increased the pressure on Western governments to take effective action. The bombing appears to have played a part in inducing the Bosnian Serbs to accept peace terms they had earlier rejected. Operation DELIBERATE FORCE, NATO's first major application of force, has not been much discussed as a case of responding to violations of the laws of war, but in large measure it was exactly that.

The Dayton Accords, concluded on 20-21 November 1995, appear to ensure in numerous provisions that peace is not bought at the price of forgetting war crimes. The General Framework Agreement mentions "the obligation of all Parties to cooperate in the investigation and prosecution of war

crimes and other violations of international humanitarian law."<sup>55</sup> The military agreement requires the parties to "cooperate fully" with the International Tribunal.<sup>56</sup> The constitution of Bosnia and Herzegovina specifies that "no person who is under indictment by the Tribunal and who has failed to comply with an order to appear before the Tribunal, may stand as a candidate or hold any appointive, elective or other public office in the territory of Bosnia and Herzegovina."<sup>57</sup> The UN International Police Task Force (IPTF) established under Dayton has a responsibility to provide information to the International Tribunal.<sup>58</sup>

After the Dayton Accords were signed in Paris, implementation of the laws of war continued to be problematical in former Yugoslavia. There was a campaign, not very effective except in the Serb world and in some countries particularly sympathetic to Serbia, to cast doubt on the legitimacy and impartiality of the Tribunal. Serbs in particular seized on various happenings as supposed evidence of the bad faith of the Tribunal. Antonio Cassese, President of the Tribunal, at least twice informed the UN Security Council of the refusal of the Republika Srpska and the Federal Republic of Yugoslavia (Serbia and Montenegro) to cooperate with the Tribunal.<sup>59</sup> The Federal Republic of Yugoslavia did permit the Tribunal to establish an office in Belgrade, and by 1997 was offering it some very limited cooperation. In 1997 Croatia handed over a few suspects for trial.

Since Dayton, the main problems of implementation of legal norms have concerned attempts to secure return of refugees (attempts which have had very little success) and efforts to get those indicted of war crimes arrested. In 1995 and 1996 there was a succession of contradictory statements from spokesmen for the NATO-led Implementation Force (IFOR) as to whether it was or was not part of the force's duty to search for and arrest suspected war criminals, a question touched upon, but not answered unambiguously, in the UN Security Council resolution on IFOR of December 1995.<sup>60</sup> International arrest warrants for Radovan Karadžić and Ratko Mladić were issued by the Tribunal on 11 July 1996, pointedly addressed to "all States and to the Implementation Force (IFOR)." In summer 1997 two other suspects were arrested by international forces in former Yugoslavia: one by UNTAES (United Nations Transitional Administration for Eastern Slavonia) on 27 June, and one by British troops in the Stabilization Force (SFOR), which was the continuation of IFOR, on 10 July. At the time of the latter arrest, another suspect was shot dead. Three more indictees were arrested by SFOR in December 1997 and January 1998.

The Tribunal may in the long run have some part in the restoration of battered norms. In this respect its impact may be general as much as in former



Yugoslavia. It could have an important educational and moral role, and the fact that its proceedings are being televised could reinforce that. The Tribunal merits support, but at the same time there is a need for understanding of the inherent difficulties of the tasks with which it is entrusted.

***The International Tribunal for Rwanda.*** The acts of genocide in Rwanda in the first half of 1994 required a response from the UN Security Council. It failed to secure the cooperation of States to take effective action to stop the killings, but in November 1994 it took steps to establish the International Tribunal for Rwanda.<sup>61</sup> It too was established against a background of a failure of the international community to do anything more decisive. Nonetheless, this was the first time that an international criminal tribunal had been established in respect of an essentially non-international situation. The adoption by the UN Security Council of the Statute for this tribunal (which, in contrast to the tribunal on Yugoslavia, is predicated on the assumption that the conflict in Rwanda is non-international) provides some legal reinforcement to the claim that failure to observe certain basic humanitarian rules is an international offense even in civil wars. The government of Rwanda, despite reservations and difficulties, is offering some collaboration with the Tribunal, which is located in Arusha in Tanzania. The first trials began in 1997, but the tribunal has been beset by difficulties. As with the Yugoslav Tribunal, only a few indictees have been brought into custody. The organization of the Tribunal was severely criticized in a UN report in February 1997: a second report one year later, while noting significant improvements, also pointed to remaining weaknesses. The continuing bitter conflicts in the Great Lakes region, including Hutu-Tutsi killings within Rwanda, do not suggest that the Tribunal has yet had a significant effect in reducing the horrors.

## **Twelve General Issues and Conclusions**

In 1993 Sir Frank Berman, Legal Adviser to the UK Foreign and Commonwealth Office, wrote in a useful study of the problems of compliance: "It seems to many that the problem is not to discover what the law is, or how to apply it to the particular case, or even whether the existing rule is 'satisfactory' or not, but rather how to secure or compel compliance with the law at all."<sup>62</sup> If this diagnosis is accepted, it becomes necessary to put forward some thoughts about why the implementation problem is so difficult, how implementation works on the occasions when it does, and what the results have been, or may be in the future, of new efforts—through the UN and international criminal

tribunals—to overcome previous problems of implementation. The twelve points below attempt to draw some lessons from the hesitant and incomplete transition from a largely State-based system of implementation to one which also encompasses a wide range of UN-based elements. Their underlying theme is that implementation of the laws of war is not only a narrow humanitarian/legal matter, but is also a key aspect of the conduct of international relations and the management of national and international security policies.

*First*, there are historical errors and political dangers in a picture of “international humanitarian law” as coming out of Geneva, as a gospel that needs merely to be disseminated and applied in the rest of the world, or as a body of law that can progressively bring the use of force under control. Such perceptions of the law may have contributed to some of its disastrous failures in the 1980s and 1990s. The term “laws of war” is preferable to “international humanitarian law.” There is a need to place more emphasis on the idea that this body of law is intensely practical—that it represents, at least in part, a set of professional military standards and bargains among States; that its origins are as much military as diplomatic; and that its implementation can have consequences which are for the most part compatible with the interests of those applying it.

*Second*, some of the formal provisions in treaties on the laws of war for securing compliance with their terms have not worked well. Cases in point are the provisions for Protecting Powers (which have been little used) and the establishment of the International Fact-Finding Commission (used not at all). As was envisaged in some treaties, trials, whether before national or international tribunals, are an important means of implementing the laws of war. However, they are by no means the only such means, and attention should not be centered exclusively on this form of enforcement. The near-exclusive preoccupation of lawyers with major international trials reduces the numerous strands in the rope of implementation to one single strand, which is liable to break under the strain. The two international tribunals established in respect of former Yugoslavia and Rwanda may yet have a deterrent impact, but they have experienced difficulties, and remain crucially dependent on the cooperation of States. They have not replaced national trials of various kinds, which have continued in parallel with the two international tribunals.

*Third*, some other formal provisions regarding implementation have worked better, especially those providing for assistance by the ICRC. However, the ICRC’s role is necessarily a limited one owing to requirements of confidentiality, impartiality, and neutrality, and it can do little or nothing to assist political, judicial, and military responses to violations.



*Fourth*, some formal and informal procedures, and methods of inducing compliance and responding to violations, have developed that were only foreseen to a limited extent in earlier treaties. Many such developments have been assisted by extensive media coverage of crises and conflicts involving laws of war issues.

In particular, and *fifth*, actions by international organizations, coalitions, and alliances have become an increasingly significant factor in the implementation process. Since the 1980s the United Nations (especially the Security Council) has acquired a key role in a wide range of attempts to secure observance and enforcement of the laws of war. This role, still in its infancy, has run into many difficulties, but it offers certain advantages over a State-based system of implementation.

*Sixth*, several UN-authorized military interventions have had as part of their formal justification the persistence of violations of humanitarian law in the country concerned. There are strong and legitimate worries, particularly in some postcolonial States, that the increased diplomatic attention to the implementation of international humanitarian standards could have the unintended effect of providing a basis for external intervention, and even a new form of colonialism.

In some countries and regions, *seventh*, there is a growing tendency for individuals to bring cases, often based on human rights law but in which the law of armed conflict may also be relevant, before either national or international courts and institutions.

Relatedly, and *eighth*, the idea of an International Criminal Court, as a main means of securing implementation of the laws of war as well as of certain other international rules, is making progress at the UN. However, its establishment and operation depend on State compliance. For better or for worse, and whatever their formal positions on the proposal, some States can be expected in one way or another to seek to delay action on the proposed court and to circumscribe its powers of investigation, arrest, and prosecution, in order to prevent their own military or political leaders from being exposed to the risk of trial. Further, there is a risk, to which the ICRC has drawn attention, that States might use the existence of such a court as an excuse for not carrying out their existing obligations to ensure that all who commit grave breaches are put on trial, regardless of nationality.<sup>63</sup>

Indeed, *ninth*, and again for better or for worse, we live in a world of States. In most cases the laws of war, like other parts of international law, are implemented through national mechanisms of various kinds: deliberations in government departments, national laws, manuals of military law, rules of

engagement, government-established commissions of inquiry, national courts, courts-martial, and administrative controls over military institutions and over careers. The State-based system of implementation also encompasses the practice of engaging in reprisals against States perceived to be violating the law. In one way or another, the continuing if diminished relevance of reprisals has been emphasized by a number of States in their reservations to laws of war treaties.

*Tenth*, the State-based system of implementation suffers from certain built-in flaws: States are reluctant to take firm action against their own nationals, and their tendency to rely on military self-help against foreign States perceived as violating fundamental norms can degenerate into uncontrolled war. Thus, the search for improved systems of implementation (whether to supplement or replace those of States) is bound to continue in the twenty-first century.

Despite (*eleventh*) the many ongoing attempts to strengthen the means of formal international legal redress against major war crimes committed by a State, there remains a strong case for viewing the laws of war as having thus far consisted principally of a set of internationally approved national professional military standards, backed up by national military and civil legal systems, rather than as a system of international criminal justice. As in the 1990-1991 Gulf conflict, there can be powerful reasons for a State or coalition to apply the laws of war even in the absence of reciprocity by the adversary.

*Twelfth*, and finally, a critical intellectual weakness which has seriously affected understanding and implementation of the laws of war is the almost complete divorce between two important schools of thought about security matters in the post-1945 period. On the one hand, theorists of deterrence (a concept not limited to its most extreme form, nuclear deterrence) have shown little interest in the laws of war. On the other hand, proponents of international humanitarian law have had little to say about deterrence of any kind, nuclear or conventional. In an age in which major powers have become more deeply involved than ever in implementation of the laws of war but do not seem to be doing particularly well at it, we can no longer afford the luxury of this self-inflicted weakness. The separation between deterrence and the laws of war will not disappear entirely, but it could be reduced if there were more open acceptance that even rules of restraint need to be backed up with threats of severe consequences; that the tribunals established in respect of former Yugoslavia and Rwanda are envisaged as having a deterrent purpose; that deterring violations of humanitarian norms is already a function of much international political and military action; that effective international use of



force in an alliance or UN context requires common understandings of the legal rules on how force is employed; and that public support for a military action may depend on confidence that it not only has sound strategic and political aims, but also is in conformity with the international law governing the conduct of armed conflict.

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Notes

A version of this article is also appearing in two parts in 29 SECURITY DIALOGUE, no. 2 (June 1998), and no. 3 (Sept. 1998).

1. Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and other Devices (Protocol II), as amended, May 3, 1996, arts. 1 (2), 3–12, 35 I.L.M. 1209 (1996). For more details, see *infra*, text at n. 34.

2. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, opened for signature Dec. 3, 1997, art. 1, 36 I.L.M. 1507 (1997) [hereinafter Mine Convention]. (For more details, see *infra*, text at n. 35.)

3. See, e.g., Draper, *Implementation of International Law in Armed Conflicts*, INT'L AFF., Jan. 1972, at 46–59. This useful survey looks particularly at three mechanisms—the Protecting Power system, reprisals, and penal processes.

4. Two English-language edited collections taking this broad historical approach to the subject are RESTRAINTS ON WAR: STUDIES IN THE LIMITATION OF ARMED CONFLICT (Howard ed., 1979); and THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD (Howard et al. eds., 1994).

5. BEST, WAR AND LAW SINCE 1945 (1994).

6. The present survey is a distillation, substantially updated, of my contribution to a study commissioned by the European Commission Humanitarian Office. That two-volume study looked at the role, and problems, of law in humanitarian crises generally, including problems of implementing existing rules of “international humanitarian law.” See Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, in I EUROPEAN COMMISSION, LAW IN HUMANITARIAN CRISES (How Can International Humanitarian Law be Made Effective in Armed Conflicts?) 13 (1995). The same paper was also published at 6 DUKE J. COMP. & INT'L L. 11 (1995).

7. Federal Ministry of Defence of the Federal Republic of Germany, HUMANITARIAN LAW IN ARMED CONFLICTS: MANUAL, para. 1202 (August 1992) [hereinafter GERMAN MANUAL]. This is the English translation of ZDv 15/2 HUMANITÄRES VÖLKERRECHT IN BEWAFFNETEN KONFLIKTEN: HANDBUCH, issued in August 1992. Rüdiger Wolfrum discusses the same thirteen factors in his chapter *Enforcement of International Humanitarian Law*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 517 (Fleck ed., 1995). In his survey, Wolfrum does briefly refer to the possibility of military intervention by States not party to the original conflict; and also to certain implementation roles of the UN (pp. 526 and 546–7).

8. The full texts of the Hague Conventions and other pre-1989 laws of war agreements cited in this paper may be found in THE LAWS OF ARMED CONFLICTS (Schindler & Toman eds., 3d ed. 1988); and DOCUMENTS ON THE LAWS OF WAR (Roberts & Guelff eds., 2d ed. 1989).

9. From an account by the President, Erich Kussbach, *The International Humanitarian Fact-Finding Commission*, 43 INT'L & COMP. L.Q. 185 (1994).

10. The circumstances in which the ICRC was prepared to make public statements about violations was outlined in *Action by the International Committee of the Red Cross in the Event of Breaches of International Humanitarian Law*, INT'L REV. RED CROSS, March–April 1981, at 76.

11. For such expositions of Article 1, see Condorelli and Boisson de Chazournes, *Quelques remarques à propos de l'obligation des Etats de 'respecter et faire respecter' le droit internationale humanitaire 'en toutes circonstances'*, in *ETUDES ET ESSAIS SUR LE DROIT INTERNATIONAL HUMANITAIRE ET SUR LES PRINCIPES DE LA CROIX-ROUGE* 17 (Swinarski ed., 1984); and Gasser, *Ensuring Respect for the Geneva Conventions and Protocols: The Role of Third States and the United Nations*, in *EFFECTING COMPLIANCE* 24 (Fox & Meyer eds., 1993). Dr. Gasser, then Legal Adviser, ICRC, was writing in a personal capacity.

12. I owe this point to Prof. Frits Kalshoven, who kindly made available the preliminary results of his careful researches on the drafting history of common Article 1.

13. See Rüdiger Wolfrum's excellent chapter, *The Decentralized Prosecution of International Offences Through National Courts*, in *WAR CRIMES IN INTERNATIONAL LAW* 233 (Dinstein & Tabory eds., 1996).

14. For an account of the trial of 44 former Dergue members which began in Addis Ababa on 13 December 1994, see Ryle, *An African Nuremberg*, *THE NEW YORKER*, October 2, 1995, at 50. The charges included genocide and crimes against humanity. On 13 February 1997, a further 5,198 individuals, of whom 2,246 were already in detention, were charged with genocide, war crimes and other offenses. *THE GUARDIAN*, February 14, 1997, at 17.

15. Some of the evidence for this proposition is in Roberts, *The Applicability of Human Rights Law During Military Occupations*, 13 *REV. OF INT'L STUD.*, January 1987, at 39; and Cerna, *Human Rights in Armed Conflict: Implementation of International Humanitarian Law Norms by Regional Intergovernmental Human Rights Bodies*, *IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW* (Kalshoven & Sandoz eds., 1989).

16. For the facts of the case, see 38 *Y.B. OF THE EUR. CONV. ON HUM. RTS.* (1997), especially the judgment at 308–14. On the UK government reaction, see, e.g., the main front-page story, *Tory Anger as European Court Condemns Gibraltar Killings*, *THE INDEPENDENT*, Sept. 28, 1995, at 1.

17. Commissions of inquiry are, for example, entirely neglected in *NATIONAL IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW: PROCEEDINGS OF AN INTERNATIONAL COLLOQUIUM HELD AT BAD HOMBURG*, June 17–19, 1988 (Bothe ed., 1990).

18. Report of the Committee of Privy Counsellors Appointed to Consider Authorized Procedures for the Interrogation of Persons Suspected of Terrorism, Cmnd. 4901, at 1–2 & 11–23 (H.M.S.O., 1972).

19. Kahan et al., *FINAL REPORT OF THE COMMISSION OF INQUIRY INTO THE EVENTS AT THE REFUGEE CAMPS IN BEIRUT* (Government of Israel, 1983), reprinted in 22 *I.L.M.* 473 (1983).

20. The Canadian Commission of Inquiry reported in June 1997 after being refused a request to extend its hearings. See *DISHONOURLED LEGACY: THE LESSONS OF THE SOMALIA AFFAIR*, Report of the Commission of Inquiry into the Deployment of Canadian Forces in Somalia (1997). See also the huge compilation, *INFORMATION LEGACY: A COMPENDIUM OF SOURCE MATERIAL FROM THE COMMISSION OF INQUIRY INTO THE DEPLOYMENT OF CANADIAN FORCES TO SOMALIA*, CD-ROM (Government of Canada, 1997). This source contains the Report of the Commission of Inquiry, Research Studies, Hearings Transcripts, 11,500 Evidentiary Exhibits, Transcripts of the courts-martial, and other materials.



21. For a discussion of the dilemmas involved, see Pion-Berlin, *To Prosecute or to Pardon? Human Rights Decisions in the Latin American Southern Cone*, 16 HUM. RTS. Q. 105 (1994), at 130. On truth commissions, see also Hayner, *Fifteen Truth Commissions, 1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597 (1994); Ensalaco, *Truth Commissions for Chile and El Salvador: A Report and Assessment*, 16 HUM. RTS. Q. 656 (1994).

22. Kuttat, *Avenues Open for Defence of Human Rights in the Israeli-Occupied Territories*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES: TWO DECADES OF ISRAELI OCCUPATION OF THE WEST BANK AND GAZA STRIP 501 (Playfair ed., 1992).

23. For a skeptical survey, see KALSHOVEN, *BELLIGERENT REPRISALS* (1971). For the definition of reprisals I have also drawn on the 1992 GERMAN MANUAL, *supra* note 7, para. 476; and on the slightly revised version of the same paragraph in Fleck, *supra* note 7, at 204.

24. A useful and judicious discussion of the many factors involved in non-use of gas in the Second World War is SPIERS, *CHEMICAL WARFARE* 62 (1986). He also stresses the attitudes of political leaders, and the non-assimilation of gas weapons by military commanders.

25. Explored further in Adam Roberts, *The Laws of War in the 1990-91 Gulf Conflict*, INT'L SEC., Winter 1993/94, at 134, 163-4.

26. Between 1972 and 1997 eleven states withdrew their reservations to the 1925 Geneva Protocol, presumably because of their apparent inconsistency with the 1972 Biological Weapons Convention or the 1993 Chemical Weapons Convention: Ireland (1972); Australia (1986); New Zealand (1989); Czechoslovakia (1990); Romania, Chile, Bulgaria (1991); the Netherlands (1995); South Africa, France (1996); and Belgium (1997). Source: Communication to the author from French Foreign Ministry, acting as Depositary, September 1997.

27. Original English texts of the partial withdrawals of reservations to the 1925 Geneva Protocol by Canada (August 1991) and the United Kingdom (November 1991) supplied by the Department of Foreign Affairs and Trade in Ottawa, and the Foreign and Commonwealth Office in London, September and December 1997.

28. Explicit prohibitions on reprisals are contained in Protocol Additional to the Geneva Conventions of 12 August 1949, and Relative to the Protection of Victims of International Armed Conflicts, June 10, 1977, arts. 51(6), 52(1), 53(c), 54(4), 55(2), & 56(4), 16 I.L.M. 1391 (1977), 72 AM. J. INT'L L. 457 (1978). For a succinct discussion of the background, see KALSHOVEN, *CONSTRAINTS ON THE WAGING OF WAR* 102-4 (1987).

29. Text of Italy's statements of interpretation (made in 1986) and of Germany's declarations (1991) supplied to the author by the Swiss Federal Department for Foreign Affairs, July-Sept. 1988 and July 1997. The Italian statement can also be found in Schindler & Toman, *supra* note 8, at 712-13; and Roberts & Guelff, *supra* note 8, at 465. Text of UK statement at ratification in 1998 supplied by Foreign and Commonwealth Office, London, Feb. 1998.

30. See esp. Schwebel, *The Roles of the Security Council and the International Court of Justice in the Application of International Humanitarian Law*, 27 N.Y.U. J. INT'L L. (1995); and THE UNITED NATIONS AND INTERNATIONAL HUMANITARIAN LAW: ACTES DU COLLOQUE INTERNATIONAL A L'OCCASION DU CINQUANTIÈME ANNIVERSAIRE DE L' ONU, (Cordorelli et al. eds., 1996).

31. Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the U.N. General Assembly, Dec. 9, 1948, art. VIII, 78 U.N.T.S. 277, 45 AM. J. INT'L L. (Supp.) 7 (1951); Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques, Dec. 10, 1976, art. V, 31 U.S.T. 333, 1108 U.N.T.S. 152; Protocol I, *supra* note 28, art. 89.

32. The Chemical Weapons Convention [Convention on the Prohibition of the Development, Production and Stockpiling of Chemical Weapons and on Their Destruction, 32 I.L.M. 800 (1993)] entered into force on 29 April 1997, six months after the 65th ratification. As of 31 December 1997, 106 States (including all five permanent members of the Security Council) had become parties. UN World Wide Web site accessed on Jan. 12, 1998, <http://www.un.org>.

33. Convention on the Safety of United Nations and Associated Personnel, arts. 1(b) & 7(3), approved by U.N.G.A. Res. 49/59, Dec. 9, 1994, U.N. Doc. A/RES/49/59, Feb. 17, 1995, 34 I.L.M. 482 (1995). On the UN role in implementation, see also Article 12. The Convention will enter into force thirty days after the twenty-second instrument of ratification, accession, etc. has been received by the Depositary. As of 31 December 1997, sixteen States had notified consent to be bound. UN World Wide Web site, *supra* note 32.

34. Amended Protocol II, Conventional Weapons Convention, *supra* note 1. This protocol also seeks to establish special protection for a wide range of ICRC and other humanitarian missions. It will enter into force six months after the twentieth acceptance (i.e., notification of consent to be bound by it) has been received by the Depositary. As of 31 December 1997, twelve States had notified consent to be bound. UN World Wide Web site, *supra* note 32.

35. Mine Convention, *supra* note 2. The Convention was signed by over a hundred States and, as of 31 December 1997, three States had ratified, etc.

36. Genocide Convention, *supra* note 31, art. IX. This provides, remarkably, that disputes as to the interpretation, application, or fulfillment of the Convention, including those relating to the responsibility of a State for genocide, shall be submitted to the ICJ at the request of any party to a dispute. Many States, on accession or ratification, made reservations about this article's granting of jurisdiction to the ICJ.

37. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, Annexed Regulations, arts. 4(2) & 14(7), 249 U.N.T.S. 240. Here, the ICJ's role is modest: to appoint a Commissioner-General for Cultural Property, or a chief arbitrator, in the event that the parties concerned are not able to agree upon a choice for either of these posts.

38. Corfu Channel (U.K. v. Alb.), 1947-8 I.C.J. 15; 1949 I.C.J. 4, 244.

39. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

40. Legality of the Threat or Use of Nuclear Weapons (Advisory Op.), 1996 I.C.J. 4 (July 8), 35 I.L.M. 809 (1996).

41. United States Diplomatic and Consular Staff in Teheran (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

42. Frontier Dispute (Burkina Faso/Mali), 1986 I.C.J. 554 (Dec. 22).

43. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Op.), 1971 I.C.J. 16 (June 21).

44. The Commitment Against Impunity was Section III of the Global Human Rights Accord of 29 March 1994. This accord was the second of thirteen between January 1994 and December 1996 that collectively constituted the Guatemala peace accords. On 18 December 1996, the Guatemalan Congress passed a sweeping amnesty law exempting soldiers and guerrillas from prosecution for killings, kidnappings, and acts of torture committed during the conflict.

45. DEP'T OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS, app. 0, at 36 (1992), *reprinted in* 31 I.L.M. 612 (1992).

46. Report on Iraqi War Crimes (Desert Shield/Desert Storm) (Unclassified Version) 6-7, 11-19 (prepared under the auspices of the Secretary of the Army, January 8, 1992). This



document was submitted to the UN fourteen months later, and circulated the same day as UN Doc. S/25441, March 19, 1993.

47. Lt. Gen. Hussein Kamel, a senior Iraqi leader implicated as a war criminal, defected to Amman in August 1995. There were not many calls for him to be tried for war crimes. He returned to Iraq in February 1996 and was murdered, presumably on account of his defection.

48. On 26 June 1992, the UNCC Governing Council decided that members of the Coalition Armed forces who had been prisoners of war, and suffered mistreatment in violation of international humanitarian law, were eligible for compensation. On 10 November 1994, the Governing Council decided in favor of compensation in cases in this category. UN Docs. S/AC.26/1992/11 of June 26, 1992 and S/AC.26/1994/4 of Dec. 15, 1994, at 9–10. To date, about 10 individuals in this category have each received an award of \$2,500.

49. For a useful early discussion with much reference to past cases of reparations, see Bederman, *The United Nations Compensation Commission and the Tradition of International Claims Settlement*, 27 N.Y.U. J. INT'L L. & POL. 1 (1994). See also Greenwood, *State Responsibility and Civil Liability for Environmental Damage Caused by Military Operations*, in PROTECTION OF THE ENVIRONMENT DURING ARMED CONFLICT (69 International Law Studies, Grunawalt et al. eds., 1996), esp. pp. 404–10.

50. Information supplied by United Nations Compensation Commission, Geneva, in a letter to the author, Dec. 8, 1997; supplemented by phone and fax, Jan. 12, 1998.

51. For example, S.C. Res. 764 of July 13, 1992, and 771 of Aug. 13, 1992.

52. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, May 3, 1993, para. 26, reprinted in 32 I.L.M. 1159 (1993).

53. Following the Croatian government's crushing of the rebel Serb Republic of Krajina in August 1995, European Union monitors compiled a report accusing the Croat government of being "largely responsible" for a campaign of atrocities carried out against Serb civilians in the Krajina. Human rights abuses by Croatian soldiers were also described in a report by a UN Human Rights Action Team. Both reports were leaked to The Guardian newspaper. Borger, *EU Accuses Croatia of Atrocities*, THE GUARDIAN, Sept. 30, 1995, at 10.

54. Sweeney, *UN Cover-up of Srebrenica Massacre*, THE OBSERVER, Sept. 10, 1995, at 19.

55. General Framework Agreement for Peace in Bosnia and Herzegovina, initialed at Dayton, Nov. 20, 1995, art. IX, U.N. Doc. S/1995/999, annex, 35 I.L.M. 75 (1996).

56. *Id.*, annex 1-A, Agreement on the Military Aspects of the Peace Settlement, art. X; and annex 6, Agreement on Human Rights, art. XIII(4).

57. *Id.*, annex 4, Constitution of Bosnia and Herzegovina, art. IX(1).

58. *Id.*, annex 11, Agreement on International Police Task Force, art. VI.

59. Letters from Antonio Cassese to UN Security Council, May 22 and July 11, 1996.

60. S.C. Res. 1031, Dec. 15, 1995, at paras. 4, 5, 14 and 15.

61. S.C. Res. 955, Nov. 8, 1994, adopting the Statute of the International Tribunal for Rwanda. Rwanda, a non-permanent member of the Security Council, was the only country to vote against the resolution. China abstained. The other thirteen members supported the resolution.

62. Berman, *Preface*, in Fox & Meyer, *supra* note 11, at xii.

63. Statement of the ICRC before the Preparatory Committee for the Establishment of an International Criminal Court, United Nations, New York, Aug. 4–15, 1997, at 2.

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## Bellum Americanum: The U.S. View of Twenty-First-Century War and Its Possible Implications for the Law of Armed Conflict

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Michael Schmitt

FOR NEARLY AS LONG AS HUMANS HAVE ENGAGED in organized violence, there have been attempts to fashion normative architectures to constrain and limit it. Such architectures—labeled the law of armed conflict in late-twentieth-century parlance—are the product of a symbiotic relationship between law and war. At times, man, fearful that warfare is evolving in a negative direction, acts *proactively* through law to forestall possible deleterious consequences. Thus, for example, many States, including the United States, have agreed to ban the use of blinding lasers in advance of any military force fielding them.<sup>1</sup> Much more frequently, however, law has proven *reactive*.<sup>2</sup> Indeed, in the twentieth century, codification efforts have followed major wars in almost lock-step fashion.<sup>3</sup>

As the global community enters the next millennium, it is a propitious moment to consider how this symbiosis between war and the law of armed conflict will continue to evolve. That is the purpose of this essay. It begins by



asking what warfare might look like in the twenty-first century. This prognosis provides the foundation on which to offer suggestions as to how law might respond to future war.

Two obstacles stand in the way of any predictive endeavor along these lines. First, it quickly becomes apparent that there are myriad reasonable alternative futures, for the universe of variables is vast. Who are likely to be the core adversaries of the next century? How technologically advanced will these notional opponents be, and what might they target? What types of conflict will dominate the future? Will States generally fight alone, or cooperatively under a umbrella organizations such as the UN, NATO, WEU, or even the European Union? How will economic, political, ethical, and social forces affect weapons development and acquisition?

The second obstacle is more basic. Even assuming *arguendo* that a “best” guess can be discerned among potential futures, history, as Arthur Schlesinger has noted, “teaches us that the future is full of surprises and outwits all our certitude.”<sup>4</sup> Who, for example, watching the Wright brothers’ *Flyer* in 1903 would have predicted that air power would dominate late-twentieth-century warfare or that reconnaissance would be conducted from man-made objects circling the earth?<sup>5</sup>

Despite the fog obscuring the future, the search for its correct trajectory is a necessary exercise in our efforts to affect it positively. This essay acknowledges the uncertainty involved but evades its full force by focusing on a particular alternative future, what will be called here *Bellum Americanum*—American war, the view of future war and warfare most prevalent in U.S. military circles. Use of the model should be judged neither xenophobic nor ethnocentric. Rather, it was selected because its vision is, in a relative sense, developmentally mature. Moreover, as the construct of a technologically-oriented military wielding significant influence over how even combined operations<sup>6</sup> are executed, the U.S. approach will likely exhibit determinative influence over warfare’s evolution for the foreseeable future.

After describing *Bellum Americanum* at some length, the essay turns to the “stressors” it presents for the current law of armed conflict. The term “stressors” is used to suggest that law evolves as it is stressed by changing circumstances. Much as water seeks a constant level, law inevitably moves to fill normative lacunae. Correspondingly, law loses its normative valence when it no longer serves “community”—a relative concept—ends. Thus, law is contextual and directional. It is contextual in the sense that it is understood and applied based upon the specific social, economic, political, and military milieu in which it operates. It is directional, for it is characterized by distinct

vectors; its generation or demise is rarely spontaneous or random. Cognizant of the suspect character of any predictive effort, then, this essay will describe and analyze how the context of a notional future, *Bellum Americanum*, might affect law substantively and directionally. Of course, only time can validate the approach.

### The U.S. Vision of the Twenty-First-Century Political-Military Environment<sup>7</sup>

In the U.S. vision of the twenty-first-century world, the gap between rich and poor States—between “have” and “have nots”—will continue to grow. This chasm will result in great part from the ability of developed States to leverage their comparative economic and technological advantages. At the same time, global economic interdependence will increase due to specialization in production by individual countries or blocs thereof. That interdependence may play itself out in the form of regional trading blocs, possibly dominated by a single State. As might be expected, State-centrism will continue to weaken in the face of the growing influence of intergovernmental and nongovernmental organizations, multinational corporations, and even terrorist groups and international criminal syndicates.

Within the developed world, increased economic well-being and wider diffusion of advanced technology will give a greater number of States the wherewithal to play a consequential role on the international scene. In particular, more States will be able to invest more in weapons acquisition. Economic and technical prowess will also allow additional States to develop an indigenous weapons production capability, a destabilizing trend that would likely lead to further proliferation of high-technology weapons.<sup>8</sup>

On the other side of the chasm, the lesser and undeveloped countries will suffer from declining standards of living. Citizens of the disadvantaged States will be increasingly aware of their plight due to the pervasiveness of mass communications. The result will be, at least in some areas, unrest and instability, as the “have-nots” are sensitized to the gap between themselves and the “haves.”

Regional conflict is expected to remain the major threat to international peace and security,<sup>9</sup> and there will be an increasing likelihood of asymmetrical challenges. Stymied by the relative dominance of the United States and its allies in conventional warfare, opponents, whether States or not, will consider such unconventional means as weapons of mass destruction, information warfare, and terrorism to strike less traditional centers of gravity. Many threats will be transnational in nature—such as international drug and weapons trade;



political, religious, or ethnic extremism; environmental damage—and the risk of “wild card” events, i.e., unanticipated occurrences that fundamentally change the international power scheme, will always be present.

Security specific visions of the next century are the byproduct of these larger trends.<sup>10</sup> Military power will continue to be a major determinant of national strength, though resort to force by developed States will most often be in collaboration with others. Proliferation of conventional weapons will be widespread, and the number of nuclear powers will grow. Military forces will continue to be called on to conduct humanitarian operations and deter the spread of regional conflict, as in the case of Bosnia.

In the developed world, militaries will become smaller, compensating for their loss of personnel and equipment by leveraging technology to allow them to fight asymmetrically against larger forces.<sup>11</sup> Lesser developed but upwardly mobile countries, particularly those which aspire to regional dominance, will retain large standing armies because of the symbolism of such forces. Terrorism will be a growing factor in military planning, particularly if terrorists acquire nuclear, chemical, or biological weapons.<sup>12</sup>

Warfare will become ever more driven by and dependent upon technology. Advances in microtechnology, biotechnology, and information technology will radically transform the weapons of war and the way war is fought. So too will the growing dependence of the military on space-based assets. As society and warfare evolve, the desired targets of war will also shift. The goal will still be to strike decisively at an enemy's center of gravity (or that of a target State or, in situations short of armed conflict, non-State actor), but what constitutes a center of gravity in the future may radically differ from those with which warfighters are familiar today.<sup>13</sup> It is clear that the old paradigms of war and warfare are being broken as we enter the next millennium.

### **The U.S. Response**

In order to deal effectively with this uncertain geopolitical environment, the United States has fashioned a national security strategy labeled “Engagement,” the underlying premise of which is a rejection of isolationism in favor of the post-World War II global involvement in world affairs—illustrated by the Marshall Plan, NATO, the UN, the International Monetary Fund, the World Bank, etc.—that is viewed as having won the Cold War.<sup>14</sup> Because there are no well-defined adversaries, the military component of the strategy is capability, vice threat, based.<sup>15</sup> The goal, one that will likely continue in rough form into the foreseeable future, is to “be able to deter and defeat nearly simultaneous,

large-scale cross border aggression in two distant theaters in overlapping time frames, preferably in concert with regional allies.”<sup>16</sup> This capability to fight and win two major theater wars is complemented by the ability to conduct “multiple, concurrent smaller-scale contingency operations,”<sup>17</sup> such as limited strikes, no-fly-zone enforcement, sanctions monitoring, or peacekeeping/enforcement operations.

Operationally, these capabilities (and any others for which the need may surface) will be achieved through “full spectrum dominance,” the ability to dominate warfare whether it occurs in space, the air, on land, or at sea, and regardless of the level of hostilities. “Joint Vision 2010” is the U.S. articulation of how this will be accomplished in the twenty-first century.<sup>18</sup> It advances operational concepts, made possible through technological innovation and information superiority, that express how the United States will fight in the future. Three are particularly relevant to this essay.

The first, “dominant maneuver,” is “the multidimensional application of information, engagement, and mobility capabilities to position and employ widely dispersed joint air, land, sea and space forces.”<sup>19</sup> In the past, battlefields were generally linear—fielded forces faced each other across a geographically distinct line. In dominant maneuver warfare the battlefield is replaced by the *battlespace*, with force being applied from a wide variety of precision platforms, which are maneuvered in synchronization with other platforms to defeat a target pinpointed by superior information capabilities.<sup>20</sup>

“Precision engagement,” the second operational concept, “will consist of a system of systems that enables [U.S.] forces to locate the objective or target, provide responsive command and control, generate the desired effect, assess our level of success, and retain the flexibility to reengage with precision when required.”<sup>21</sup> The concept of precision implies more than precise weapons; it is the ability to achieve a desired effect on a specified objective.<sup>22</sup> Key to the concept is a robust surveillance and reconnaissance capability and a collection of weapons systems that can generate just the right degree and kind of effect. Complementing precision engagement is “full-dimension protection,” which will employ information technology to enhance the survivability of U.S. forces.<sup>23</sup> It is based on the truism that the easiest threat to deter is often a known one.<sup>24</sup>

Conceptually, then, warfare as envisioned in “Joint Vision 2010” will be fast-paced, mobile, and highly lethal. An array of information gathering and processing assets will operate synergistically to generate greater situational awareness of the battlespace and provide the means necessary to shape it.<sup>25</sup> If successful, the warfighter of tomorrow will be able to operate within the



enemy's decision cycle. This alternative future will cause new law to surface and highlight that which is no longer responsive to its context.

### **The Revolution in Military Affairs**

The question *du jour* among those who focus on security issues is whether these operational concepts are being made possible by a "revolution in military affairs" (RMA).<sup>26</sup> Revolutions in military affairs occur whenever the nature of war and warfare fundamentally changes.<sup>27</sup> For instance, Napoleon's use of the citizen-soldier in the French army of the 1790s presaged war involving entire societies. A more recent RMA occurred with the advent of nuclear weapons.<sup>28</sup> In the then-existing bipolar world, offsetting nuclear arsenals led to war by proxy but deterred the major-power massive conflicts that had characterized inter-State conflict during the past century and a half. As in other RMAs, new weapons and defenses (e.g., nuclear mines and artillery, intercontinental ballistic missiles, and antiballistic missile systems) were fielded, and new operational concepts (e.g., limited nuclear options, extended deterrence, counterforce and countervalue targeting) were developed.

When they occur, RMAs generate fundamental change in the normative architecture of war. For instance, the carnage that resulted from the clash of mass armies during the Napoleonic era motivated much of Hague law. Further, the sheer size of the resulting conflicts, and the fact that they now often occurred where civilians were, led to greater suffering by noncombatants; Geneva law resulted.<sup>29</sup> So too with the nuclear RMA. In the very short period since nuclear weapons have been in existence, and despite only two uses of atomic bombs, the global community has responded with treaties,<sup>30</sup> attempts to articulate customary law,<sup>31</sup> and judicial opinions.<sup>32</sup> The causal relationship between RMAs and law is apparent.

In the U.S. view, an RMA is well under way. The United States sees fundamental change in three areas: information operations, weapons systems, and space.<sup>33</sup> This author would add a fourth arena of change, one derivative of the other three—militarization of civilians and of civilian activities. *Bellum Americanum* clearly envisions a leveraging of the advantages offered by this revolution.

**Information Systems.**<sup>34</sup> It would appear that Alvin and Heidi Toffler's "Third Wave" is upon us.<sup>35</sup> Most agree that the key to the RMA of the twenty-first century will be information.<sup>36</sup> Recognizing the importance of information in

warfare hardly represents a strategic epiphany; however, in the next century these capabilities will themselves be a key source of national power.<sup>37</sup>

Many of the powerful information technologies are next generation improvements on current systems.<sup>38</sup> For example, by the early part of the twenty-first century, satellites will offer worldwide coverage any time of day and with astonishing spatial resolution. The future may even include sound sensors powerful enough to allow a satellite to detect conversations on earth.<sup>39</sup> Advances in artificial intelligence will allow this data and that from other sensors to be fused, organized, and disseminated almost instantaneously.

Even more fantastic are new technologies. Consider micromachining. Scientists now believe that in the future they will be able to build robots, disguised as insects, that will have both optical and communications capabilities. Such systems could be used in areas where current systems are ineffective, like jungles with thick canopies. Some scientists believe that the sensors may one day approach the size of dust mites<sup>40</sup> and be seedable by unmanned aerial vehicles (UAV). More amazing still, micromachined sensors may be able to taste and smell—useful senses when seeking out chemical weapons or finding objects made with a particular substance, such as the metal of military vehicles or aircraft.<sup>41</sup> Of course, whether new or improved, sensor technologies are no panacea, a fact well illustrated by the futile attempt to destroy mobile Scuds during the Gulf War.<sup>42</sup>

The ultimate benefit of information technologies is that they allow the warfighter to get inside his opponent's OODA—observe, orient, decide, act—loop and shape the battlespace before his adversary can. This represents a decisive advantage. For instance, in the not-too-distant future the individual soldier will be equipped with the Land Warrior Modular Fighting System. Its components include a helmet-mounted computerized display tied to an improved weapon with a thermal sensor capable of night vision and an image enhancer for accuracy. The system will be capable of seeing around corners and over barriers, and of digitizing images for transmission up the chain of command. Soldiers of tomorrow will be able to view real-time "picture maps" on eye-sized video displays. Not unexpectedly, they will also be equipped with computers linked to others in their unit. The net result will inevitably be a more lethal soldier, and one able to operate more autonomously in the heat of battle.<sup>43</sup>

Similar enhancements will pervade other arenas of armed conflict. Combat aircraft will benefit from information gathered by sensors on other aircraft, as well as space and ground-based sensors and uninhabited reconnaissance aerial vehicles (URAV).<sup>44</sup> This will improve targeting precision, enhance



survivability, and reduce the possibility of fratricide. Shipboard information improvements may include the Force Threat Evaluation and Weapon Assignment System, being tested by Johns Hopkins University. The system will fuse data from all of a naval battle group's radars to create a three-dimensional display containing graphics, rather than symbology, of threats; it will then recommend which should be engaged and when.<sup>45</sup>

At the operational (theater) and strategic levels of warfare, decision-making will be enhanced by the new C<sup>4</sup>ISR technologies.<sup>46</sup> Senior commanders will be able to literally watch the battle unfold. The transparency of one's opponents and the reliability and ease of communication with subordinate units will produce an unprecedented operational tempo. In particular, access to on-demand, real-time information will allow real-time planning, rather than the current practice of executing plans developed in advance of the engagement.<sup>47</sup>

Lest information be considered a panacea, it must be recognized that the technology proponents of the new era herald may generate little more than additional Clausewitzian fog of war. For instance, microminiaturization will enhance stealth (that is, low-observable/masking technologies, or LOMT), as will active-radio-frequency and next-generation passive infrared capabilities.<sup>48</sup> Similarly, by the removal of their pilot and cockpit—producing “uninhabited combat aircraft vehicles” (UCAV)—aircraft can be designed with radar cross-sections reduced by a factor of two (or four against area-surveillance radars).<sup>49</sup> A possible obstacle to transparency may be data overload—so much information that human decision-makers become overtasked and overstressed, and therefore make bad decisions.<sup>50</sup>

Finally, the availability of the systems may breed unhealthy dependencies—and vulnerabilities.<sup>51</sup> Today the U.S. military alone has over 2.1 million computers and ten thousand local area networks.<sup>52</sup> Given their importance, information systems will be key targets. Indeed, during the Gulf War they represented the lead target set for Coalition attacks.<sup>53</sup> If forces become dependent on information resources, will they be able to operate in the event of disruption?<sup>54</sup> Will information enable the forces of tomorrow . . . or cripple them?

**Weapons Systems.** The second change underlying the RMA is a quantum leap in weapons systems capabilities. It is an exaggerated continuation of a trend that has been underway for some time. For instance, through 1943 the U.S. Eighth Air Force attacked only fifty strategic targets in Germany. By contrast, in 1991 Coalition air assets struck 150 strategic targets on the first day of the

war alone.<sup>55</sup> Improvements on this scale will continue into the twenty-first century; they can be grouped into two categories, weapons systems “intelligence” and weapons effect.

Advances in the first category are previewed by today’s precision guided munitions (PGMs), colloquially known as “smart” weapons. In the next century, weapons systems will be much more than smart—they will be “brilliant.”<sup>56</sup> The key is the concept of a weapon system. Twenty-first-century weaponry will draw information from a wide variety of sources (a system), not simply from the launcher or onboard sensors, to identify a target, strike it, and report results. To illustrate, consider an attack on a suspected biological weapons facility. Because of the risk that the attack could release biologicals, precision is essential. One Air Force study describes the type of information that would be gathered prior to such an attack:

In the year 2025, sensor collection provides enough data for a virtual 3-D model of the [target] to include its composition, internal structure, baseline characteristics, and tendencies. . . . Sensors determine the building’s exact dimensions and floor plan. They then highlight soft spots. Sensors distinguish between rooms containing biological agents, test equipment, sleeping quarters, and even the snack bar. Target acquisition sensors also construct a baseline, or living archive, of data concerning routine activity and environmental conditions. Examples include the average number of people who enter and exit each day, the number of vehicles in the parking lot, and the level of noise generated by the facility.<sup>57</sup>

Using this information, mission planners can determine when the facility appears to be generating biologicals, where they are stored, and when it can be struck without causing high numbers of civilian casualties.<sup>58</sup> To destroy the biologicals before they can be released into the atmosphere, a warhead will be used that will actually count walls as it penetrates them to ensure explosion in the proper room.<sup>59</sup>

Systems not only will be more capable of determining where to strike, they will be better able to strike the exact point selected. With global positioning, inertial navigation, and other guidance systems, in the not-too-distant future accuracy will be measured in centimeters, not meters as it is today.<sup>60</sup> Weapons systems will also be much smaller due to miniaturized munitions technology (MMT), thereby allowing more weapons to be carried.<sup>61</sup> In the future, a single UCAV carrying brilliant weapons for release far from the target may have the same effect as a flight of manned aircraft that would today have to fight its way to the release point.<sup>62</sup>



The second fundamental change in weapons, that of effect, will abandon the approach of this century, whereby most weaponry destroys through penetration and explosive force. In the twenty-first century the continuum of effect will be multidimensional; explosives will predominate but be much more refined. For example, microtechnology will make possible microexplosives, mere grams of which can destroy targets.<sup>63</sup> At the other end of the spectrum, nonlethal weapons (also known as "less lethal," inasmuch as they still have the capacity to kill) will increasingly be employed to limit collateral damage and incidental injury during armed conflict and provide commanders greater tactical flexibility during peace operations.<sup>64</sup>

The variety of nonlethals being considered is impressive. Acoustic weapons can produce sound frequencies that disorient, cause pain, and bring on nausea. Microwave weapons will be able to induce seizures or simply bring on discomfort by raising the target's body temperature.<sup>65</sup> There is even some discussion of sleep-inducing agents.<sup>66</sup> Nonlethals can also incapacitate weapons and equipment. Electromagnetic-pulse weapons generate radio-frequency wavelengths that damage electrical components, usually without causing direct harm to humans.<sup>67</sup> Supercaustics and liquid metal-embrittlement agents will attack surfaces, the former by corroding them (bridges, optical lenses, roads, tires, etc.), the latter by making them brittle and thereby liable to fracture in use. Both could be delivered by shell or sprayed from an aircraft.<sup>68</sup> Microbes that eat rubber, silicon, electronics, and even oil have also been mentioned as possibilities.<sup>69</sup> Seemingly more benign are "stick-ums" and "slick-ums." The first uses polymers that form a sticky foam capable of immobilizing humans without killing them; a variant is a "super glue" that can be dispensed from the air to foul weapons and equipment components. Slick-ums, by contrast, coat surfaces with an antitraction chemical that make them difficult to walk or drive upon.<sup>70</sup>

Finally, given the reliance of future war on information systems, it is inevitable that weapons will be developed to attack them. Such traditional tactics as jammers or missiles that home in on specific electronic signals will continue to be refined. More revolutionary will be attacks on computer networks, sometimes called "hacker war." This form of warfare includes sending computer viruses into an adversary's computer system to destroy or alter data and programs. For example, "logic bombs" can be introduced that sit idle in a computer system, awaiting activation at the occurrence of a particular event or a set time; an air defense system logic bomb might be set to "explode" only when the missile launch sequence is initiated. Other techniques for disrupting an information system are as simple as flooding it with false

information, or using “sniffer” programs to collect access codes that allow entry into a target system.<sup>71</sup> In some cases, such attacks may occur without revealing the source, or even the fact, of the attack.

**Space.** The third defining aspect of the current RMA is the use of space. In much the same way that the airplane revolutionized twentieth-century warfare by opening a third medium from, through, and in which to fight, so too will access to space revolutionize warfare in the twenty-first. The value of space operations was illustrated dramatically during the Gulf War.<sup>72</sup> By the twenty-first century, they will transform how war is fought, the lethality that can be brought to bear against military objectives, the degree and nature of collateral damage and incidental injury to civilians and civilian objects, and even where conflict will occur. Space, after all, is the ultimate high ground, that objective that militaries have sought since the first combat; the fact that it is a high ground of infinite depth renders it more valuable still.<sup>73</sup>

Control of space, then, is an alluring prospect. The United States Space Command envisions space control—the ability to defend one’s own space assets from space or ground-based threats while denying the use of space to an opponent.<sup>74</sup> The reasoning is clear:

[S]o important are space systems to military operations that it is unrealistic to imagine that they will never become military targets. Just as land dominance, sea control, and air superiority have become critical elements of current military strategy, space superiority is emerging as an essential element of battlefield success and future warfare. . . . An increased dependence on space capabilities may lead to increased vulnerabilities. As space systems become lucrative military targets, there will be a critical need to control the medium to ensure U.S. dominance on future battlefields. Robust capabilities to ensure space superiority must be developed—just as they have been for land, sea, and air.<sup>75</sup>

Should space *control* operations become a reality, the next logical step is force *projection* from space. Not surprisingly, the USAF Scientific Advisory Board is already discussing such possibilities as space-based lasers, or space-based mirrors to direct lasers on the ground.<sup>76</sup> Space is clearly the next arena of warfare in the *Bellum Americanum*.

**Militarization of Civilians and Civilian Activities.** The final factor revolutionizing warfare is a growing military dependency on civilians, and on civilian objects and activities. This continues a trend that began with Napoleonic warfare and the advent of the Industrial Revolution. By the time of



the Second World War, civilians and civilian objects were being attacked directly, reflecting their criticality to military forces. In the future, the relationship with civilians and civilian activities will be closer still. As drawdowns in military forces occur in the developed world, many of the activities traditionally performed by military personnel are being assumed by civilian contractors. For example, the U.S. military is contracting out aircraft maintenance, facilities maintenance, base security, transportation, communications, and the feeding and housing of troops. Increasingly, it is approaching a point where “member of the armed forces” will be synonymous with “trigger-puller.”

Moreover, as emphasis shifts to information operations, equipment becomes less identifiable as military in character. The push to purchase “off-the-shelf” products in order to lower acquisition costs means that a device’s character is a matter of the use to which it is put. Indeed, the bulk of information operations hardware and software comprises commercial products adapted to military use. As former Vice Chairman of the Joint Chiefs of Staff, Admiral William Owens, has noted,

Today, the center of technological acceleration in each of these technologies [battlespace awareness, C<sup>4</sup>I, and precision use of force] lies generally in the commercial, non-defense sectors. Our ability to accelerate the fielding of systems, on which we will base our future military superiority, thus depends on our capacity to tap into developments taking place for the most part outside the existing Department of Defense laboratory and development infrastructure.<sup>77</sup>

Compounding the difficulty of distinguishing civilian from military is the fact that to keep costs low, many facilities—ranging from office buildings to airports—are shared by military and civilian operations. Such sharing is particularly likely with space-based assets because of the cost of putting them in orbit. Thus, Space Command is actively seeking partnerships with commercial entities and consortiums, sometimes multinational in character, as well as with civilian agencies (e.g., NASA) involved in space operations. It also seeks links with foreign and international space operators, such as the European Space Agency.<sup>78</sup>

### **The Legal Implications of *Bellum Americanum***

As noted at the outset, the context in which law operates determines its content. Changing contexts cause stress to existing normative architectures, causing new law to emerge, or outdated and irrelevant law to fade away. The

remainder of this essay will shift from the predictive to the speculative, suggesting certain stressors found in *Bellum Americanum* and their possible effects on the current law of armed conflict.<sup>79</sup> The catalog is neither exhaustive nor definitive, but merely the reflections of one writer on the possible implications of one alternative future. Moreover, the analysis is not an effort to suggest *lex ferenda*. The goal is to posit probable normative vectors, rather than offer aspirational visions of the twenty-first century.

**Jus ad Bellum.** *Bellum Americanum* will stress the current *jus ad bellum* in a number of significant ways. Most fundamentally, the concept of war and peace—of the difference between an act that is merely unfriendly and one that is wrongful as a threat or use of force under Article 2(4) of the United Nations Charter<sup>80</sup>—will be strained. In particular, because information operations “attack” an adversary without actually employing force in the kinetic sense, they will raise serious questions about what constitutes “force.”<sup>81</sup> Should the term include State-sponsored or State-conducted hacker attacks on a country’s banks, communications networks, or stock exchange? Does it make a difference if the operations are conducted to “prepare the battlefield” in anticipation of an actual conflict by, for instance, destroying military deployment plans and reserve force records, corrupting intelligence systems, or sending satellites off course? Similar stressors exist vis-à-vis the Article 39 threats to the peace, breaches of peace, or acts of aggression that empower the Security Council to authorize Chapter VII responses.<sup>82</sup> Moreover, the information era will challenge the concept of self-defense, both under Article 51 and the inherent right found in customary international law. Under what circumstances might a State be justified in responding with force to an information attack? Might such an attack constitute an “armed attack” under Article 51?<sup>83</sup> When may a State use information operations in anticipation of an armed attack?<sup>84</sup>

Arguably, such stressors might move the *jus ad bellum* in the direction of a regime based on consequences, vice acts. In the current normative scheme, the consequences of an act are often less important than its nature. For instance, a devastating economic embargo is not a “use of force” or an “armed attack” justifying forcible self-defense, even though the embargo may result in enormous suffering.<sup>85</sup> On the other hand, a relatively minor armed incursion across a border may constitute both a use of force and an armed attack.<sup>86</sup> This contrary result derives from the law’s use of “acts” as a cognitive shorthand for what really matters—consequences. Acts are more easily expressed (to “use force” versus to cause a certain quantum and quality of harm) and more easily



discerned than a standard based on effects, on the harm suffered. This synecdoche does not work well in the age of information operations because information attacks, albeit potentially disastrous, may be physically imperceptible. Thus, as the nature of an hostile act becomes less determinative of its consequences, current notions of "lawful" coercive behavior by States and the appropriate responses thereto are likely to evolve accordingly.

Even beyond information warfare, the reality of military operations in the next century will stress existing distinctions between a premature use of "defensive" force and valid self-defense. In tomorrow's high-tech battle the first shot may be the last. As weapons become more lethal, the incentive to strike first grows,<sup>87</sup> and the threshold for preemption in self-defense on the basis of apparent hostile intent drops precipitously.<sup>88</sup>

*Bellum Americanum* may also call into question *jus in bellum* participatory notions. Since the Peace of Westphalia in 1648 and the rise of the nation-State, war has been the province, and until the turn of this century the prerogative, of States. When non-State actors have participated in organized violence, the normative paradigm has been that of international and domestic criminal law, not the law of armed conflict. Even the involvement of international organizations is a relatively new phenomenon.

Yet if the U.S. vision is accurate, in the next century military forces will increasingly face non-State actors, ranging from terrorists to drug cartels. As that occurs, there will be growing pressure to articulate neoteric legal justifications for forceful responses. Consider Operation EL DORADO CANYON, the 1986 strike on targets in Libya in response to Libyan-supported terrorist attacks against Americans in Europe, including the La Belle Disco bombing in Berlin. Though justified at the time in terms of self-defense, it has been difficult to articulate the instant and overwhelming<sup>89</sup> need to resort to force once those bombings had taken place.<sup>90</sup> Or consider a hypothetical well-guarded drug laboratory in a remote region: under current international law, there is no legal basis for bombing the facility if more traditional law enforcement techniques fail. Or consider even a terrorist group that acquires biological weapons but is sheltered by a rogue State. Again, under present law there are no grounds for attacking the group until the point when it actually employs (or is about to employ) the weapons. If twenty-first-century national security threats are to come from non-State actors, then the law governing the resort to force is bound to evolve in a way that permits an effective defense against them. This will necessitate either blurring the State-non-State actor distinction or sharpening it by a new body of law governing actions against non-State actors.

**The Jus in Bello Generally.** In terms of the *jus in bello*, the differentiation between international and non-international conflict will continue to be strained.<sup>91</sup> *Bellum Americanum* sees more Bosnias on the horizon, as ethnic and religious tensions remain divisive. The applicative difficulties posed by the conceptually “neat” distinction between international and non-international armed conflicts—Additional Protocol II and common Articles 3 of the Geneva Conventions versus Additional Protocol I and the Conventions in their entirety<sup>92</sup>—have been well illustrated in the seemingly contradictory conclusions regarding conflict status issued by the International Criminal Tribunal for the Former Yugoslavia.<sup>93</sup> The difficulty of fitting future conflicts into what William Fenrick has labeled the “two box” approach will create pressures to dissolve the distinction.<sup>94</sup> Resistance to this pressure will come, of course, from States who jealously guard their autonomy. Thus, the natural tension between humanitarian concerns and sovereignty, a tension evidenced in such issues as humanitarian intervention, will worsen as attempts are made to determine which law applies to which twenty-first-century conflicts.

**Discrimination.** Discrimination is a general principle of the law of armed conflict that requires an attacker to distinguish between civilians and civilian objects on one hand and military objectives (combatants or objects) on the other, and to use weapons capable of that discrimination.<sup>95</sup> Paradoxically, despite vast improvement in weapons systems accuracy and battlespace transparency, complying with the principle may become increasingly difficult.<sup>96</sup> The problem is that the lines between lawful targets and protected objects will blur due to the growing dependency on civilians and civilian activities during military operations.

The Additional Protocol I approach to ascertaining military objectives is relatively restrictive. Before an object may be deemed a legitimate target, it must “make an effective contribution to military action” and its destruction must offer the attacker a “definite military advantage.”<sup>97</sup> Objects which make an effective contribution are those that are by nature beneficial to the military effort: weapons, aircraft, communications, etc. “Definite military advantage” refers to objects which contribute by virtue of their location (bridges, buildings used for shelter, etc.); such objects may not be attacked if only a “potential or indeterminate” advantage is anticipated.<sup>98</sup> Civilians may not be attacked<sup>99</sup> unless taking “direct part in the hostilities.”<sup>100</sup> The International Committee of the Red Cross (ICRC) commentary to the Protocol defines “direct” as “acts of war which by their nature or purpose are likely to cause actual harm to the



personnel and equipment of the enemy armed forces."<sup>101</sup> When doubt exists, a presumption of civilian status attaches.<sup>102</sup>

The degree of nexus between the object or individual to be attacked and military operations is already the subject of considerable debate.<sup>103</sup> The United States generally opposes any interpretation as restrictive as that propounded by the ICRC.<sup>104</sup> For instance, the U.S. Army has issued a legal opinion that mission-essential civilians working at U.S. bases during an armed conflict would be appropriate targets of attack by the enemy.<sup>105</sup> Moreover, the most recent of the U.S. military manuals, *The Commander's Handbook on the Law of Naval Operations*, states that "[e]conomic targets that indirectly but effectively support and sustain the enemy's war-fighting capability may . . . be attacked."<sup>106</sup> While this is not the place to resolve the debate, it is clear that a further blurring of the distinction can only increase pressures to render the standard less restrictive. By what logic, for example, would a civil engineer responsible for rapid runway repair at Base X be immune from direct attack when his military counterpart at Base Y would not be? An analogous dilemma is presented by objects. By current standards a munitions factory is a valid target. Given the essentiality of computers in twenty-first-century warfare, would not a Microsoft plant also offer an information-dependent military advantages that would merit a place for it on an air tasking order? Might the Internet itself be a lawful target?

The operational principle of "dominant maneuver" set forth in "Joint Vision 2010" is a further potential stressor for the principle of discrimination. As battle becomes virtual and nonlinear, as battlefields are transformed into battlespaces, military objectives and civilians and civilian objects will be increasingly intermingled. This diminishes the *de facto* protection formerly provided by distance from the forward edge of the battle area. While it is true that the fast-paced maneuver warfare of, for example, the German blitzkrieg made it difficult to achieve this protection, the difference from prior warfare was quantitative, not qualitative—civilians could still flee the onslaught. Dominant maneuver generates a qualitative evolution because, at least in belligerent territory, there are far fewer places to which to flee, perhaps none. Similarly, in the past strategic bombing could be avoided by moving from the vicinity of strategic targets. In the twenty-first century, by contrast, both the tactical and strategic fight may occupy the same space. Thus, civilians might move away from strategic targets (factories, storage facilities, etc.) only to find themselves in the midst of battle proper.<sup>107</sup>

This reality is likely to encourage strengthened obligations for precaution in attack, particularly target verification.<sup>108</sup> The information environment and

existence of brilliant weaponry will ease compliance, should this occur. One potential downside of the greater transparency of targets may well be that it encourages placement of military personnel and equipment near protected objects or persons in the hope that the other side will hesitate to attack lest harm befall them. The use by Saddam Hussein of civilians and cultural sites as shields is well known;<sup>109</sup> indeed, since the conflict ended Iraqi civilians have flooded potential targets on numerous occasions to protect them in the face of threatened air attacks, against which the Iraqi military would likely prove impotent.<sup>110</sup> In much the same way that Iraqi use of these tactics should not be particularly surprising, given their weakness vis-à-vis their opponents, the risk of similar practices in the notional asymmetrical battles of *Bellum Americanum* is especially high.

Perhaps an even more ominous prospect is that transparency may place a premium on perfidious acts by potential targets.<sup>111</sup> If I cannot hide, perhaps I can survive by appearing to the enemy to be other than what I am. In fact, the relaxation of the criteria for combatant status in the past decades is historical precedent supporting such a likelihood. Recall that under the Regulations annexed to Hague Convention IV, combatants were members of the regular armed forces (or formal militia), were commanded by a person responsible for their conduct, wore a fixed distinctive emblem (or uniform), carried their weapons openly, and conducted operations in accordance with the law of war.<sup>112</sup> The 1949 Geneva Convention on Prisoners of War extended this status to members of an organized resistance movement which otherwise complied with the Hague IV requirements.<sup>113</sup> This change was one of status, not acts. Thus, for example, Josip Broz Tito's guerrillas would have fallen within the definition.

As the nature of warfare evolved in the postwar period from primarily State on State to that of wars of national liberation and the like, many of the forces involved declined to distinguish themselves or carry weapons openly. The reason was quite practical. Facing a militarily superior force which occupied much of the territory in which they were operating, guerrilla fighters could not possibly make themselves so conspicuous and have any chance of success.<sup>114</sup> This fact was recognized in Additional Protocol I's Article 44 exception for situations where "owing to the nature of the hostilities an armed combatant cannot so distinguish himself." In such cases, a combatant need only carry his arms openly "during each military engagement" and "during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack."<sup>115</sup> Law responded to practicalities that rendered compliance difficult or dangerous for particular participants in the conflict.



The pervasiveness of surveillance and reconnaissance capabilities in next-generation warfare can only serve to exacerbate this trend, as the disincentives against distinctive clothing, etc., swell for many combatants. In light of the technology that will be available, even revealing themselves briefly during or immediately preceding an attack will prove risky. How States react to this reality will be driven by their perspective on the humanitarian issues presented. But just as it is not surprising that States who might be expected to face guerrillas tended to oppose Article 44 while those that either had arisen from guerrilla movements or were unlikely ever to face one did not, States which enjoy a technological advantage can be expected to resist further erosion of the standard. Those which are technologically disadvantaged may not.

A final aspect of the *Bellum Americanum* that may prove a stressor for discrimination is the use of nonlethal weapons. Nonlethals, while less deadly, tend to be less discriminatory. A slick-um will render a road treacherous for whoever passes down it, and an acoustic device is as likely to make a child playing nearby sick as it is to keep potential attackers away from a perimeter. Interestingly, the use of nonlethals derives from a desire to foster proportionality in warfare—less precise weapons are employed in lieu of more lethal ones. Accordingly, there will be significant support for relaxing the demands of discrimination when it conflicts with efforts to enhance proportionality by limiting the quantum of collateral damage and incidental injury.

**Proportionality.** Proportionality is the general principle in the law of armed conflict that prohibits means and methods of warfare that cause collateral damage to civilian objects, or incidental injury to civilians, disproportionate to the military advantage sought.<sup>116</sup> The “Joint Vision 2010” operational concept of precision engagement enabled by information systems and brilliant weaponry is likely to push traditional proportionality calculations toward a point where immediately foreseeable collateral damage or incidental injury is unacceptable, at least when caused by a technologically advanced military.<sup>117</sup> In the twenty-first century, the mere possibility of such damage may cause mission planners, or even individual soldiers, to shift to different weapons or tactics.

Collateral damage and incidental injury have historically been the product of three factors: (1) lack of full knowledge as to what is being hit; (2) inability to meter the amount of force being applied to the target; and (3) inability to ensure that a weapon strikes precisely the right point. With regard to the first,

consider the Al-'Amariyah bunker incident.<sup>118</sup> Some three hundred noncombatants were killed during the Persian Gulf War when U.S. aircraft, unaware that civilians had entered the Iraqi command and control bunker during the night, destroyed it. As to weapons availability and capability, extended gaps along the continuum of force remain. For instance, because nonlethals are absent from the inventory of most militaries, forces sent into a crowd-control or perimeter-defense situation have nothing to resort to between warnings or warning shots and the use of deadly force. Finally, in terms of accuracy—and despite the morbidly spectacular film of PGM strikes during the Persian Gulf War—the reality is that many weapons continue to lack fully reliable precision guidance. Today, for instance, fighter-bombers still “toss,” “dive bomb,” or simply drop the majority of their weapons, which in most cases are unguided, general-purpose bombs.<sup>119</sup>

Each of these obstacles will eventually be overcome by technology. “Shooters” will be able to know what is they are hitting, and to hit it with a weapon that applies only the amount of force necessary to destroy or disable it. Accuracy will be nearly 100 percent. The commander, planner, and shooter will no longer have to carefully weigh expected collateral damage and incidental injury against the concrete and direct military advantage anticipated;<sup>120</sup> properly planned and executed, an attack should necessarily result in *de minimus* collateral damage or incidental injury.

But civilian casualties will inevitably occur, and civilian objects will be damaged and destroyed—even in the twenty-first century. The evaluation of such results will turn on the exercise of “due care” in analyzing the target and selecting weapons and tactics. Of course, this standard is operative today in Article 57 of Additional Protocol I and in customary international law.<sup>121</sup> The difference in the future will be the complexity of the process, given the greater availability of target information, wider selection of weapons, and the discrimination difficulties noted above. The Al -'Amariyah bunker provides a prototype of the concerns that will surround collateral damage and incidental injury. In that case the weapon selected was the GBU-28, a five-thousand-pound, laser-guided bomb able to penetrate twenty feet of concrete before exploding. It was just the right weapon to use, because though it would destroy the bunker, its laser guidance and the bunker's thick walls rendered collateral damage and incidental injury outside the bunker unlikely. The question, therefore, was not whether the ensuing deaths outweighed the military advantage gained in destroying this important Iraqi command and control facility, but whether the planners *knew or should have known* there were civilians therein.



Nonetheless, proportionality, as traditionally understood, will retain its utility in assessing *reverberating* effects, i.e., those effects not directly caused by the attack but rather by first-tier damage. The most often cited example is the attack on the Iraqi electrical grid during the Gulf War.<sup>122</sup> That attack severely degraded Iraqi command, control, and air defenses; unfortunately, it also denied electricity to the civilian population, thereby affecting hospitals, refrigeration, emergency response capabilities, and so forth. This type of problem will only be exacerbated in the next century due to the interconnectedness of military and civilian functions. For instance, an attack on a satellite providing weather data necessary for flight operations may deny that information to agriculture, disaster relief operations, etc. Destruction of a satellite providing position data may likewise endanger civilian aircraft or ships by denying them essential navigational information. Shutting down a computer used to direct rail traffic, in an effort to disrupt the military logistic chain, may cause shortages of essential civilian goods. The spreading dependence on highly interconnected information and communications systems implies particular risks of reverberating effects during information warfare. These future realities will impel proportionality calculations towards a macro view of collateral damage and incidental injury.<sup>123</sup>

**Military Necessity.** The full-spectrum dominance envisioned in *Bellum Americanum* will surely stress, in an unintended way, traditional understandings of military necessity.<sup>124</sup> Under current norms, an actor must be able to articulate the imperative military advantage to be gained by an attack. "There must be some reasonable connection between the destruction of property [or individuals] and the overcoming of the enemy forces."<sup>125</sup> The problem is that as one faces an opponent capable of military domination across the diverse spectrum of war, one inevitably considers asymmetrical attacks, possibly using unconventional means.

The Iraqi Scud missile attacks against Israeli population centers were portentously archetypal. In no way did the attacks contribute to directly overcoming Iraq's enemies; Israel was not even involved in the conflict. Yet the apparent randomness of the attacks disguised a clever attempt to fragment the coalition by drawing in the Israelis and thereby putting Arab Coalition members in the position of being supported by Israelis in an attack on fellow Arabs. Facing full-spectrum dominance, Saddam Hussein was seeking psychological means to weaken the forces facing him.<sup>126</sup>

History teaches that forces facing vastly superior opponents often resort to seemingly random acts of violence. As incidents ranging from the bombing of

the King David Hotel in Jerusalem to that of the Khobar Towers in Riyadh demonstrate, when frustrated in battle disadvantaged opponents often carry the fight beyond the fields of fire in order to rupture alliances, cause an enemy to lose the will to fight, or weaken public or international support for their adversary's war effort. If full-spectrum dominance becomes a reality, acts that would seem wanton or random—that is, not militarily necessary—are likely to be all that remain to the disadvantaged side. This may cause the concept of military necessity to slip over time, in much the same way that practicalities have caused a relaxation in the criteria for combatant status.

**Humanity.** By contrast, *Bellum Americanum* exhibits stressors which may suggest a heightening of the standards of humanity, a concept initially expressed in the St. Petersburg Declaration of 1868 in connection with prohibiting means of warfare that “uselessly aggravate the sufferings of disabled men, or render their death inevitable.”<sup>127</sup> The maturation of the principles of proportionality and necessity has subsumed much of humanity's original meaning; after all, to the extent suffering is useless it is militarily unnecessary and, because it offers no direct and concrete military advantage, disproportionate. What remains are *ab initio* prohibitions on methods and means of warfare that are not so much inhumane as inhuman. We intuitively recognize them as wrongful regardless of the context in which they occur. To some extent, they are acts which violate the “dictates of public conscience,”<sup>128</sup> acts that civilized people *just do not do*.

There has been a clear trend in the direction of prohibiting weapons on the basis of humanity, most recently evidenced by the Chemical Weapons,<sup>129</sup> Biological Weapons,<sup>130</sup> Conventional Weapons,<sup>131</sup> and Anti-Personnel Mines<sup>132</sup> conventions. There is little doubt that each of the prohibited weapons can be employed in specific scenarios so as to cause minimal suffering and little risk to civilians or civilian objects. The use of tear gas to protect a facility is more humane than firing a rifle. Similarly, Protocol IV of the Conventional Weapons Convention forbids the use of permanently blinding lasers, thereby driving soldiers to the use of lethal force to protect themselves.<sup>133</sup> The rationale for these and analogous cases is humanity. However much sense it might make in a particular context, civilized human beings do not blind or poison each other, and therefore such behavior is outlawed.

Recall just some of the weapons imagined above for the twenty-first century—acoustic weapons that induce vomiting, microwaves that cause the human body to heat up, and electromagnetic pulses that will cause an airplane to fall to the earth after its engines shut down. Such weapons may be humane in



certain circumstances, but there is little doubt that many individuals will react to them viscerally as *inhuman*. Given the current trend in humanity-based conventions, we can expect many of these weapons to be targeted for prohibition, regardless of their military necessity or the possibilities they offer for proportionate use.

**Treaty Regimes.** War as envisioned in *Bellum Americanum* will stress a number of treaty regimes. For instance, the 1972 Biological Weapons Convention prohibits the development, stockpile, acquisition, or retention of "microbial or other biological agents, or toxins in quantities that have no justification for prophylactic, protective or other peaceful purposes" and of "weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict."<sup>134</sup> By this standard, the use of microbes capable of "eating" rubber, silicon, electronics, or oil is likely to be forbidden. Similarly, the 1972 Chemical Weapons Convention prohibits parties from developing, acquiring, stockpiling, or using chemical weapons. Chemical weapons include toxic chemicals which through their "chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals."<sup>135</sup> Many supercaustics and metal embrittlement agents could certainly fall into this category, and there is little doubt that sleep-inducing agents would.

A particular challenge posed by *Bellum Americanum* is to the current legal regime of space. There are a number of conventions which limit military activities in space, the Outer Space Treaty having the widest scope.<sup>136</sup> Article I of the treaty creates a *res communis*, *res nullius* area by providing that "[o]uter space . . . shall be the province of all mankind . . . [and] . . . shall be free for exploration and use by all States." Article III requires all activities in space be carried on "in the interest of maintaining international peace and security" and restricts use of the moon and other celestial bodies to "peaceful purposes."<sup>137</sup>

These provisions would appear at odds with the conception of space operations set forth in "Joint Vision 2010" and by both the U.S. Space Command and the U.S. Air Force Scientific Advisory Board. How, for example, does the operational concept of space control, which includes denial of the use of space to the enemy, comport with the Article I requirement that it be preserved for use by all States? How can concepts of force projection be squared with the reservation of space for peaceful purposes? Indeed, how can the centrality of space to the U.S. vision of warfare in the twenty-first century be at all consistent with the treaty prohibitions?

In fact, the inconsistency is not as substantial as might at first glance appear. First, there is no prohibition on the placement of weapons in space, only upon weapons of mass destruction. Thus, whether or not their use is prohibited, their development and emplacement would not be. More fundamentally, whether or not the treaty would survive the outbreak of hostilities is the subject of vigorous debate.

Under classical international law, treaties did not retain their effect during armed conflict; war existed beyond the realm of international relations—*bellum omnium contra omnes*. The more modern approach accepts the survival of certain legal relationship between opposing belligerents.<sup>138</sup> Three schools of thought characterize this camp. The first maintains that whereas some legal relations survive, treaties do not. A second group argues that treaties survive armed conflict unless their existence is fundamentally contrary to the existence of conflict, as for example a collective defense treaty between two adversaries would be. The third approach, the “theory of differentiation,” takes a middle ground, asking whether continued vitality of the treaty in question is consistent with the larger context in which it operates (such as the existence of Parties not involved in the conflict).<sup>139</sup>

This area of law remains unsettled, particularly when applied in the context of a multilateral treaty governing an entire dimension of the earth-space environment. Nevertheless, the fervor of the debate can only be exacerbated by *Bellum Americanum*’s emphasis on space-based operations. As this occurs, calls to establish some degree of normative clarity are certain to be heard.

Clarity will also surely be sought over the concept of the reservation of space for “peaceful purposes.” There is a long-standing dispute over the latter term, with some arguing that peaceful purposes should be understood to be “nonmilitary,” whereas others, including the United States, interpret it as meaning “nonaggressive.”<sup>140</sup> Any military activities conducted under a UN Chapter VII mandate, pursuant to the Article 51 right to individual or collective self-defense, or consistent with the inherent right of self-defense under customary international law would by definition be nonaggressive. As some States begin to enjoy full-spectrum dominance grounded in great part on space-based assets, whereas others without the resources to exploit space are rendered vulnerable by their relative nonparticipation in the space regime, the peaceful-uses issue is likely to resurface as a major substantive point of international discord.

**Dissemination.** In *Bellum Americanum*, the ability to direct lethal force is increasingly pushed down the chain of command. Individual soldiers, sailors, or



airmen of the twenty-first century will have far more information on which to base the decision to employ force than have their twentieth-century counterparts. Moreover, they will control a wider spectrum of force, capable of being applied with greater precision. Thus, they will be both more and less lethal, and operate more autonomously than ever before. This will drive a need for relatively complex training in the law of armed conflict at far lower levels. Future warfare will therefore move current law of armed conflict dissemination requirements toward reinforcement and strengthening, and it will increase the importance of legal advisers.<sup>141</sup>

*Normative Relativism.* As the gap between the military “haves” and “have nots” widens, there will be subtle stressors that encourage an interpretation of the law of armed conflict relative to the State to which it is applied. For instance, due to their high cost, not all States can afford the precision munitions that help foster discrimination and proportionality. State A, which cannot afford them, is not criticized when it drops an unguided bomb that causes incidental injuries that are proportional to the military advantage gained. However, when State B, which can afford PGMs, elects to employ an unguided bomb in lieu of a precision weapon, it must justify that decision as reasonable in the circumstances (e.g., preserving PGMs for other targets which present a greater risk of collateral damage and incidental injury). *In abstracto*, an identical standard is applied to both States—a requirement to minimize collateral damage and incidental injury. In practice, however, the developed State is held to a higher standard.

In the high-technology war of the twenty-first century this reality will be exaggerated many-fold, as the gap between “haves” and “have nots” widens. If State A has limited sensor capabilities whereas State B’s are robust, must State B reasonably exhaust those capabilities to ensure the target is what B believes it to be? Or will it only be held to the standard of care imposed on A? In all likelihood, the answer lies in the teleological underpinnings of the law of armed conflict. It is no longer a body of law designed to ensure a fair fight between two opponents; on battlefields of the twentieth and twenty-first centuries, the law of chivalry has been overtaken by humanitarian law. Today, the law of armed conflict is designed primarily to minimize suffering and prevent unnecessary destruction. This being so, belligerents are held to the standards to which they are capable of rising. The sole exceptions are absolute prohibitions, such as the direct targeting of civilians or the use of poison.

This normative relativism may take on a new form in the next century. If the economic and technological gap widens as the alternative future set forth

above suggests it will, the move towards a capability-based humanitarian regime may play itself out in an obligation to *field* weapons that pose the least risk to protected persons and objects.<sup>142</sup> Some may even argue that if a wealthy State has the economic wherewithal to arm its forces with precision weapons, it should be obligated to do so. Similarly, it may be argued that if it has access to nonlethal weapons, its forces must be armed with them so long as doing so is otherwise operationally sound. This subtle shift from dictating tactics to dictating public policy may well prove a by-product of the “haves–have nots” polarization of the twenty-first century.

The polarization may also determine the position States take toward law of armed conflict codification efforts. For logical reasons, States likely to be the target of a particular mean or method of warfare are most likely to support its prohibition; those likely to use it will generally oppose its banning. Thus, for example, the United States opposes the Ottawa treaty on antipersonnel mines in part because it sees great utility for the weapon on the Korean Peninsula.<sup>143</sup> Similarly, the United States, which will remain the major space power into the next century, interprets the Outer Space Treaty quite liberally. Given the technological gap between militaries that will emerge in the twenty-first century, there are certain to be attempts to offset weaknesses through bans on weaponry and its use. Support for such efforts, whether motivated by genuine humanitarian concerns or a clear-eyed view of one’s own military impotence, will be determined in great part by the extent to which a State enjoys the benefits of *Bellum Americanum*.

Of course, one must always be careful of what one wishes for. The “haves-have nots” dichotomy is driven by war-fighting concerns; opposition to weaponry may not always be positive in terms of *humanitarian* principles. After all, much of the weaponry on the drawing boards will effectively reduce collateral damage and incidental injury to civilians and civilian objects. States likely neither to use new weapons nor be the target thereof will, therefore, play a vital role as “honest-brokers” in maintaining the humanitarian *raison d’être* of the law.

### Concluding Thoughts

Only time will tell whether the alternative future that has here been labeled *Bellum Americanum* will be realized. To the extent that it is, law can be expected to respond reactively and proactively to it. The normative consequences, some of which have been suggested above, are likely to be momentous. Assessments of whether such changes are steps forward or



backwards will often depend on one's perspective—nationality, ethical and humanitarian values, economic station in life, etc. Nevertheless, regardless of the conclusions individual cognitive contexts lead us to, there are portents of danger on the horizon for humanitarian principles. The line between war and peace and between inter- and intra-State conflict may become dangerously vague. Discrimination is placed at risk by growing militarization of civilians and civilian activities. The widening gap between military “haves” and “have-nots” will encourage disadvantaged forces to fight asymmetrically in ways that stress, possibly even violate, current normative parameters. Finally, the risk of warfare extending into a new arena—space—is looming.

In light of these risks and the fact that a revolution of military affairs is upon us, perhaps the international community should take an increasingly proactive approach to normative change. As new technologies in warfare are brought on line, the disincentives for the “haves” to abandon or limit them will be high, as will the incentives for the “have-nots” to defeat them through other than conventional means. In a world evolving as rapidly as today's, time is of the essence. Of course, this is not to suggest codification for the sake of codification. Some weapons and operational concepts foster humanitarian ends. The point is that the time to think clearly about twenty-first-century war and what can be done to shape it is now.

In closing, it is worth noting that one *objectively* valid threat to a normative architecture which fosters world order in the twenty-first century is the seeming isolation of the acts of future warriors. The further removed they are from their acts of war, the more difficult it will be for them to retain the humanitarian spirit that underlies the law of armed conflict. It is one thing to push a button while flying through the sky surrounded only by clouds; it is quite another to watch a human being one has shot bleed to death. The latter act brings home much more vividly the moral significance of the authority to use deadly force that one has been entrusted with. As we enter the next millennium, we must not lose sight of the reality of armed conflict, a reality found only in the consequence of an act, not the act itself.

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### Notes

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1. Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Protocol on Blinding Laser Weapons (Protocol IV), Oct. 13, 1995, 35 I.L.M. 1218 (1996). The ban on bacteriological weapons also illustrates the proactive approach. Despite isolated uses of

the weapons in modern warfare, their employment has generally been avoided. Instead, the international community has articulated a near universal abhorrence of the weapons, twice codifying prohibitions thereon in this century. Protocol for the Prohibition of the Use of Asphyxiating, Poisonous, or other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65, 14 I.L.M. 49 (1975); Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, *opened for signature* Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 164, 11 I.L.M. 309 (1972). Biological warfare activities of the Japanese during World War II are described in TAMAKA YUKI, *HIDDEN HORRORS: JAPANESE WAR CRIMES IN WORLD WAR II*, at 135–166 (1996). For a fascinating account of the use of biologicals during antiquity, see Adrienne Mayor, *Dirty Tricks in Ancient Warfare*, 10 Q. J. MIL. HISTORY 32 (1997).

2. For instance, only the advent of the U.S. Civil War motivated adoption by the Union Army of Professor Francis Lieber's "set of regulations," today known as the Lieber Code, regarding conduct in war. Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, originally published as U.S. War Dep't, General Orders No. 100 (Apr. 24, 1863), *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 101 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988) (Discussed in Richard R. Baxter, *The First Modern Codification of the Law of War*, INT'L REV. RED CROSS, June 1963, at 171). Likewise, it took Henri Dunant's account of the horrendous misery at the Battle of Solferino during the Italian War of Unification to focus international attention on the need for a humanitarian organization to address wartime suffering. HENRI DUNANT, *SOUVENIR DE SOLFERINO* (1862). The International Committee of the Red Cross (ICRC) was created as a result.

3. E.g., Russo-Japanese War of 1904–05—Geneva Convention of 1906 and Hague Conventions; World War I—1925 Gas Protocol and the Geneva Convention of 1929; World War II—Geneva Conventions of 1949 and 1954 Cultural Property Convention; Korea, Vietnam, and the "wars of national liberation"—Additional Protocols I and II, the Environmental Modification Convention, and the Conventional Weapons Convention. International law even reacted to the Cold War through treaties designed to limit the spread of nuclear weapons, the terrifying power of which had been demonstrated at Hiroshima and Nagasaki. Each of the law of armed conflict instruments is available at the ICRC documents website, <[http://www.icrc.org/unicc/ihl\\_eng.nsf/web?OpenNavigator](http://www.icrc.org/unicc/ihl_eng.nsf/web?OpenNavigator)>. Arms control treaties are available at the Arms Control and Disarmament Agency website, <<http://www.acda.gov/treatie2.htm>>.

4. ARTHUR M. SCHLESINGER, JR., *THE BITTER HERITAGE: VIETNAM AND AMERICAN DEMOCRACY, 1941–1966* (1967).

5. On the difficulty of predictive efforts regarding technology, see Herb Brody, *Great Expectations: Why Technology Predictions Go Awry*, TECHNOLOGY REVIEW, July 1991, at 39.

6. Joint operations are those which include forces of more than one service. Combined operations include forces of more than one State.

7. This vision is based primarily on JOINT CHIEFS OF STAFF, *CONCEPT FOR FUTURE JOINT OPERATIONS: EXPANDING JOINT VISION 2010*, at 8–9 (1997) [hereinafter CFJO]. See also U.S. SPACE COMMAND, *VISION FOR 2020*, n.p. (1997) [hereinafter SPACE COMMAND VISION]. Note that the term "vision" is employed here because it is the term used within the U.S. military when articulating views of the future. It is predictive rather than aspirational in nature. For example, it is not the U.S. desire to see the gap, discussed *infra*, between technologically advanced and technologically disadvantaged States grow.



8. On the proliferation threat from both State and non-State actors, see OFFICE OF THE SECRETARY OF DEFENSE, *PROLIFERATION: THREAT AND RESPONSES* (1996).

9. The National Security Strategy categorizes the threats described herein as: regional dangers, asymmetric challenges, transnational dangers, and wild cards. WHITE HOUSE, *A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY* 8–10 (1997) [hereinafter NSS]. For an argument that future clashes are likely to be driven by culture rather than ideology or economics, see Samuel P. Huntington, *The Clash of Civilizations?*, FOREIGN AFFAIRS, Summer 1993, at 22.

10. These trends are described generally in CFJO, *supra* note 7, at 9–10.

11. On leveraging the advantage in technology, see Anthony H. Cordesman, *Compensating for Smaller Forces: Adjusting Ways and Means through Technology*, U.S. Army War College Third Annual Conference on Strategy Proceedings, Apr. 1992, at 1.

12. All of the likely adversaries of the United States in the Middle East are developing chemical and/or biological warfare capabilities. DEPT OF DEFENSE, OFFICE OF INTERNATIONAL SECURITY AFFAIRS, *UNITED STATES SECURITY STRATEGY FOR THE MIDDLE EAST* 17–18 (1995). Each also supports, in one form or another, terrorism.

13. A war game held recently at National Defense University illustrates the type of warfare the future may hold. Set in the year 2000, the scenario posits an OPEC meeting that collapses when Saudi Arabia opposes Iranian demands for a production cutback in order to drive prices up. After mobilizing its forces, Iran conducts several conventional attacks on Saudi naval vessels. Hoping to destabilize the Saudi government and keep the U.S. and U.K. out of the conflict, the Iranians conduct new generation unconventional warfare. For instance, a Saudi refinery is destroyed when computer malfunctions in its control mechanism cause fire to break out, a “logic bomb” placed in the computer system running trains in the U.S. causes a passenger train to crash into a freight train, computer “worms” begin to corrupt the U.S. military’s classified deployment database, and a “sniffer” disrupts funds transfers in the Bank of England. Steve Lohr, *Ready, Aim*, ZAP, N.Y. TIMES, Sept. 30, 1996, at D-1.

14. NSS, *supra* note 9, particularly at 2.

15. Admiral William A. Owens, *The Emerging System of Systems*, PROCEEDINGS, May 1995, at 36, 36. A threat based strategy is designed to counter specific threats, e.g., the Soviet threat during the Cold War. By contrast, a capability based strategy is driven by particular capabilities, e.g., global mobility, a force has. Of course, the strategy selected drives force structure development. For a catalog of the capabilities seen as necessary by the U.S. military, see JOINT CHIEFS OF STAFF, *NATIONAL MILITARY STRATEGY* 24–27 (1997) [hereinafter NMS]. A comprehensive study of U.S. strategic strengths and weaknesses is NATIONAL DEFENSE UNIVERSITY, *STRATEGIC ASSESSMENT 1996* (1996). The Department of Defense completed a major assessment of future force structure requirements, *The Quadrennial Defense Review*, in 1997. For the Secretary of Defense’s overview of the Review, see WILLIAM S. COHEN, *THE REPORT OF THE QUADRENNIAL DEFENSE REVIEW* (May 1997). A longer-term assessment than the QDR is NATIONAL DEFENSE PANEL, *REPORT, TRANSFORMING DEFENSE: NATIONAL SECURITY IN THE 21ST CENTURY* (Dec. 1997).

16. NMS, *supra* note 15, at 15. Today, the dual threat is generally viewed as consisting of North Korea and Iran or Iraq. It is recognized that these may not be the opponents of the future. However, the underlying concept, being capability based, is that the United States needs to be ready to respond to two major theater wars, whoever the opponents might be.

17. *Id.* at 16.

18. JOINT CHIEFS OF STAFF, JOINT VISION 2010 (1996) [hereinafter JV 2010]. Joint Vision 2010 is complemented by service-specific visions: U.S. NAVY, FORWARD . . . FROM THE SEA (1994); U.S. ARMY, ARMY VISION 2010 (1996); U.S. AIR FORCE, GLOBAL ENGAGEMENT: A VISION FOR THE 21ST CENTURY (1996).

19. JV 2010, *supra* note 18, at 20.

20. See CFJO, *supra* note 7, at 50.

21. JV 2010, *supra* note 18, at 21.

22. CFJO, *supra* note 7, at 51.

23. JV 2010, *supra* note 18, at 23.

24. Focused logistics, the fourth operational concept is the “fusion of information, logistics, and transportation technologies to provide rapid crisis response, to track and shift assets even while enroute, and to deliver tailored logistics packages and sustainment directly at the strategic, operational, and tactical levels of operations.” *Id.* at 24.

25. The National Military Strategy cites the following “strategic enablers:” (1) a high quality force; (2) robust all-source intelligence; (3) global command and control; (4) air and sea control; (5) space control; and (6) strategic mobility. NMS, *supra* note 15, at 27.

26. On the “revolution in military affairs,” see Dennis M. Drew, *Technology and the American Way of War: Worshipping a False Idol?* AIR FORCE J. LOGISTICS, Winter 1987, at 21; James R. FitzSimonds, *The Coming Military Revolution: Opportunities and Risks*, PARAMETERS, Summer 1995, at 30; Dan Goure, *Is There a Military-Technical Revolution in America’s Future?* WASH. QUARTERLY, Autumn 1993, at 175; Andrew F. Krepinevich, *Cavalry to Computer: The Pattern of Military Revolutions*, in STRATEGY AND FORCE PLANNING 582 (Naval War College Faculty eds., 1995); Andrew F. Krepinevich, *Keeping Pace with the Military-Technical Revolution*, ISSUES IN SCIENCE & TECHNOLOGY, Summer 1994, at 23; Kenneth F. McKenzie, *Beyond Luddites and Magicians: Examining the MTR*, PARAMETERS, Summer 1995, at 15; Abhi Shelat, *An Empty Revolution: MTR Expectations Fall Short*, HARVARD INT’L REV., Summer 1994, at 52.

27. Colin Gray, e.g., cites seven “historical transformations of warfare” since the fall of Rome: (1) fifth-century cavalry, which “ushered in a long period of advantage for soldiers who could fight on horseback”; (2) the military revolution of the sixteenth and seventeenth centuries that “was led by the adoption of firearms for siege and open warfare”; (3) the “Nation in Arms,” a “concept of popular warfare, increasingly armed and sustained by industrially and agriculturally modern states”; (5) mechanized warfare, signaled in 1916 by use of the tank in the Battle of the Somme and large-scale aerial battles over Verdun; (6) nuclear warfare; and (7) information age warfare. Colin S. Gray, *The Influence of Space Power upon History*, 15 COMPARATIVE STRATEGY 293, 297 (1996). See also Eliot A. Cohen, *A Revolution in Warfare*, FOREIGN AFFAIRS, March–April 1996, at 37.

28. For a comparison of the nuclear and information RMAs, see Martin C. Libicki, *Information & Nuclear RMAs Compared*, NAT’L DEF. U. STRATEGIC FORUM, No. 82, July 1996, available on-line at <<http://198.80.36.91/ndu/inss/strforum/forum82.html>>.

29. “Geneva Law” denotes that portion of the law of armed conflict addressing protected persons: civilians, prisoners of war, the sick or shipwrecked, and medical personnel. It is to be distinguished from “Hague Law,” which governs methods and means of combat, occupation, and neutrality. For a discussion of the international instruments which fall into each category, and of those which display elements of both, see FREDERIC DE MULINEN, *HANDBOOK ON THE LAW OF WAR FOR ARMED FORCES* 3–4 (1987).

30. E.g., Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43, 2 I.L.M. 889 (1963); Treaty for



the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco), Feb. 14, 1967, 634 U.N.T.S. 281, 6 I.L.M. 521 (1967); Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161, 7 I.L.M. 811 (1968); Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, Feb. 11, 1971, 23 U.S.T. 701, 10 I.L.M. 146 (1971).

31. *E.g.*, Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons, G.A. Res. 1653(XVI), U.N. GAOR, Supp. No. 17, at 4, U.N. Doc. A/5100 (1961); Resolution on the Non-Use of Force in International Relations and Permanent Prohibition of the Use of Nuclear Weapons, G.A. Res. 2936, U.N. GAOR, Supp. No. 30, at 5, U.N. Doc. A/8730 (1972); Resolution on the Non-Use of Nuclear Weapons and Prevention of Nuclear War, G.A. Res. 35/152D, U.N. GAOR, Supp. No. 48, U.N. Doc. A/35/48 (1980).

32. Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, July 8, 1996, 35 I.L.M. 809 (1996). On the case, see Michael N. Schmitt, *The International Court of Justice and the Use of Nuclear Weapons*, NAVAL WAR COLL. REV. Spring 1998, at 91.

33. CFJO, *supra* note 7, at 23–25. Some have cautioned about forgetting basic truisms of war in the haste to embrace new technologies as a panacea to clear the fog of war. Mackubin Owens of the Naval War College has noted that there is a

recrescence of a McNamara-like worship of technology in some parts of the Pentagon, a worship that ignores the principal lesson of military history: as long as war involves humans, no technology can completely eliminate friction, ambiguity and uncertainty, thereby ensuring that a military organization will function at 100 percent efficiency. . . . The question is, who is more relevant to war in the real world: Clausewitz, who observed that “everything in war is simple, but the simplest thing is difficult. The difficulties accumulate and end by producing a kind of friction that is inconceivable unless one has experienced war.”; or those who reject him, explicitly or implicitly, assuming that technology will render friction in war obsolete?

But technology is only part of the equation. Any approach to war that ignores strategy and friction and tempts us to forget that war is waged against an adversary with an active will, is doomed to failure.

Mackubin T. Owens, *Planning for Future Conflict: Strategy vs. “Fad,”* STRATEGIC REV., Summer 1996, at 5, 6.

34. See generally, DOMINANT BATTLESPACE AWARENESS (Stuart Johnson & Martin Libicki eds., 1995), available on-line at <<http://198.80.36.91/ndu/inss/books/dbk/dbk1.html>>.

35. See generally ALVIN TOFFLER & HEIDI TOFFLER, WAR AND ANTI-WAR (1993) and ALVIN TOFFLER & HEIDI TOFFLER, THE THIRD WAVE (1980). The Tofflers posit three waves of warfare driven by the age in which they took place: agricultural, industrial, and information. Military objectives are in great part determined by the period during which they are pursued. For instance, in the agricultural era, land was an objective, whereas in the industrial period, industrial capacity was. The work of the Tofflers is now *de rigueur* in U.S. war colleges, though not all are convinced of its validity. For a piece criticizing the work as neo-Marxist and charging that the Tofflers had to “rearrange certain chronologies so the events develop in proper perspective,” see R.L. DiNardo & Daniel J. Hughes, *Some Cautionary Thoughts on Information Warfare*, AIRPOWER JOURNAL, Winter 1995, at 70. For two fascinating discussions of the origin of war, see BARBARA EHRENREICH, BLOOD RITES (1997) & ROBERT L. O’CONNELL, RIDE OF THE SECOND HORSEMAN: THE BIRTH AND DEATH OF WAR (1995).

36. In anticipation of this reality, the U.S. Air Force, Army, and Navy have all established information warfare centers, as has the Central Intelligence Agency, and doctrine on information warfare has recently been formally issued by the U.S. Joint Staff. Mark Walsh, U.S.

*Military Expands Information Warfare Defense*, DEFENSE NEWS, April 28–May 4, 1997, at 25; Lohr, *supra* note 13, at D4; Chairman, Joint Chiefs of Staff Instruction (CJCSI 3210.01), Joint Information Warfare Policy (series, some documents classified). See also Joint Chiefs of Staff, *Information Warfare: Legal, Regulatory, Policy and Organizational Considerations for Assurance* (Research Report for the Chief, Information Warfare Division, J6K) (July 4, 1995).

37. This point is made by Joseph Nye and William Owens:

The core of these capabilities—dominant situational knowledge—is fungible and divisible. The United States can share all or part of its knowledge with whomever it chooses. Sharing would empower recipients to make better decisions in a less-than-benign world, and should they decide to fight, they could achieve the same kind of military dominance as the United States.

As its capacity to provide this kind of information increases, America will increasingly be viewed as a coalition leader, not just because it happens to be the strongest but because it can provide the most important input for good decisions and effective action for other coalition members. Just as nuclear dominance was the key to coalition leadership in the old era, information dominance will be the key in the information age

Joseph S. Nye, Jr., & William A. Owens, *America's Information Edge*, FOREIGN AFFAIRS, March/April 1996, at 20, 27.

38. There are four categories of sensors: (1) far stand-off sensors, such as satellites; (2) near stand-off sensors, such as aircraft and unmanned aerial vehicles carrying various sensors (multispectral, passive microwave, electronic intelligence, etc.); (3) in-place sensors, such as acoustic, gravimetric, biochemical, and ground-based optical; and (4) weapons sensors, such as infrared, reflected radar, etc. MARTIN C. LIBICKI, *WHAT IS INFORMATION WARFARE?* 22 (1995).

39. Resolution is expected to reach ten meters, improvable to two-to-three meters with signal-to-noise calculations. Periodic coverage in the submeter range will be made possible through multispectral, hyperspectral, and synthetic aperture radar (SAR) images. Jeffrey E. Thieret et al., *Hit 'Em Where It Hurts: Strategic Attack in 2025*, in AIR UNIVERSITY, 2025, WHITE PAPERS (vol. 3, bk. 1) 173, 187 (1996).

40. Pat Cooper, *U.S. Develops Army of Tiny Robots*, DEF. NEWS, Nov. 11–17, 1996, at 4.

41. Smelling sensors would be designed to detect particular chemical molecules, which would cause an organic change in the sensor detectable by irradiated light or X-ray energy. Tasting sensors would attach themselves to particular substances. They too could be irradiated. In both cases, overhead sensors could be used to collect the data. Thieret, *supra* note 39, at 187–88.

42. For an excellent review of future sensors and sensor operations, see Space Cast 2020, *The Infosphere: Surveillance and Reconnaissance in 2020*, AIRPOWER JOURNAL, Summer 1995, at 8.

43. Barbara A. Jezior, *The Revolutionized Warfighter Circa 2025* (unpublished manuscript on file at Naval War College Library, 1997); Art Pine, *Revolutionary High-Tech Military Plan Isn't Ready for the World's Battlefields*, PROVIDENCE JOURNAL, Jan. 5, 1997, at D5. See also *Infantry System Turns Soldier into High-Tech Warrior*, NATIONAL DEFENSE, Apr. 1997, at 24.

44. USAF SCIENTIFIC ADVISORY BOARD, *NEW WORLD VISTAS: AIR AND SPACE POWER FOR THE 21ST CENTURY* (summary vol.) 11 (1995).

45. Douglas Waller, *Onward Cyber Soldiers*, TIME, Aug. 21, 1995, at 38, 41.

46. Command, control, communications, computers, intelligence, surveillance, and reconnaissance. An outline of U.S. approaches to this subject is JOINT CHIEFS OF STAFF (J-6), *C4I FOR THE WARRIOR: GLOBAL COMMAND AND CONTROL SYSTEM—FROM CONCEPT TO REALITY* (1994).



47. See JV 2010, *supra* note 18, at 15. What these developments will do to the fundamental nature of military decision making has yet to be seen. Greater technology could lead to greater restraints on the "shooter," a phenomenon exemplified in the past by excessive radar based ground control over East Bloc pilots conducting aerial intercepts. The danger is that the closer the senior commander is to being on the battlefield, the more he or she may want to control it. CFJO, *supra* note 7, at 27, notes this danger. "Access to extensive information about the tactical situation may tempt strategic and operational commanders to take control of tactical actions." On the other hand, the individual shooter will have far more information available to make informed decisions than has been the case thus far. For example, today fighters patrolling no-fly zones depend on aircraft such as the AWACS to provide them a verbal picture of their combat environment. In the twenty-first century, that information will be immediately available in the cockpit. Such individual capabilities could have the effect of allowing greater autonomy to those who directly apply force.

48. NEW WORLD VISTAS, *supra* note 44, at 60; CFJO, *supra* note 7, at 25. Even today a stealth Comanche helicopter and a T-3 unmanned, reconnaissance aerial vehicle (URAV) are under development. *To Dissolve, to Disappear*, ECONOMIST, June 10, 1995, at 11.

49. NEW WORLD VISTAS, *supra* note 44, at 8.

50. DiNardo & Hughes, *supra* note 35, at 75.

51. See, e.g., James Blackwell, *Prospects and Risks of Technological Dependency*, U.S. Army War College Third Annual Conference on Strategy Proceedings, Apr. 1992, at 29; Neil Munro, *Our Electronic Achilles' Heel: A Wonk Armed with a Computer Could Bring America to Its Knees*, WASH. POST NAT. WEEKLY ED., Aug. 14-20, 1996, at 24.

52. Thomas E. Ricks, *Information-Warfare Defense is Urged*, WALL STREET JOURNAL, Jan. 6, 1997, at 1, B2.

53. The Operation Desert Storm Air Campaign Plan is described in DEPT OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR (Title V Report to Congress) 95-101 (1992). The approach to current targeting philosophy has been set forth by Colonel John Warden as "Five Strategic Rings." The concentric rings are political leadership, economic systems, supporting infrastructure, population, and military forces. Attacking leadership targets (command and control, communications, etc.) greatly diminishes the difficulty of attacking military forces. Leadership is seen as the primary center of gravity. See generally, John A. Warden III, *The Enemy as a System*, AIRPOWER JOURNAL, Spring 1995, at 44.

54. For an argument that the "network force" must train to the possibility of disruptions in the information system, see, Mark Tempestilli, *The Network Force*, PROCEEDINGS, June 1996, at 42, 46.

55. Jeffrey McKittrick et al., *The Revolution in Military Affairs*, in BATTLEFIELD OF THE FUTURE 65, 78 (Barry R. Schneider & Lawrence E. Grinter eds., 1995).

56. The most publicly visible change has been in weapons accuracy, a result of misleading Gulf War news coverage of smart bomb (precision guided munitions—PGM) attacks. In fact, they were prematurely acclaimed. Only roughly 8 percent of the weapons dropped during the war were precision guided. A General Accounting Office study of attacks on twenty major targets found that at least two laser guided weapons were used against each. At least six were dropped on 20 percent of the targets and 15 percent of the targets were attacked by at least eight. Tony Capaccio, *GAO Questions U.S. Air Power Impact on Gulf War*, DEFENSE WEEK, June 30, 1997, at 1. See also Barton Geldman, *U.S. Bombs Missed 70% of the Time: "Smart" Munitions Far More Accurate*, WASH. POST, Mar. 16, 1991, at A-1.

57. Thieret et al., *supra* note 39, at 185-6.

58. Technologies that will enable such analysis include hyperspectral and magnetic resonance imaging. In the former, the electromagnetic spectrum is broken into its constituent bands for hundreds of individual analyses. The data is then fused for a single readout. This capability frustrates the possibility of a target avoiding detection in one spectrum (e.g., visual or infrared). In magnetic resonance imaging, particles spread over a building by a UAV are sucked into it through the ventilation system. Air- or space-borne sensors would then image the particles to determine the building's internal structure. *Id.* at 187.

59. William Matthews, *New Bombs Penetrate, Incinerate*, AIR FORCE TIMES, Feb. 16, 1998, at 6.

60. NEW WORLD VISTAS, *supra* note 44, at 38.

61. Thieret et al., *supra* note 39, at 189. For instance, today hardened targets are best attacked with at least a two-thousand-pound guided bomb unit. Programs are underway to reduce that to 250 pounds, smaller than the average conventional bomb in today's arsenal.

62. From a ground perspective, consider the Army's BAT, the brilliant antiarmor submunition that will be fired by the Army Tactical Missile System. The munitions will use acoustic and infrared sensors to identify a formation of vehicles, single one out for attack, and destroy it. Owens, *supra* note 15, at 37.

63. NEW WORLD VISTAS, *supra* note 44, at 9–10.

64. Department of Defense policy on the use of nonlethal weapons is set forth at DOD Directive 3000.3, Policy for Non-Lethal Weapons (July 9, 1996). See also James W. Cook III et al., *Non-lethal Weapons: Technologies, Legalities, and Potential Policies*, AIRPOWER JOURNAL, Special Edition 1995, at 77, 78; James C. Duncan, *A Primer on the Employment of Non-Lethal Weapons*, 1998 NAVAL L. Rev. (forthcoming).

65. Douglas Pasternak, *Wonder Weapons*, U.S. NEWS AND WORLD REPORT, July 7, 1997, at 38. Both acoustic and microwave weapons could be used for perimeter defense or crowd control, and both, used to the extreme, are potentially lethal.

66. Greg R. Schneider, *Nonlethal Weapons: Considerations for Decision Makers* 27 (University of Illinois at Urbana-Champaign, Arms Control, Disarmament, and International Security Occasional Paper, Jan. 1997).

67. *Id.* at 14.

68. *Id.* at 20–2.

69. Jezoir, *supra* note 43, at 16; Schneider, *supra* note 66, at 27.

70. Schneider, *supra* note 66, at 9–10. Especially useful in urban warfare because of dependency on roads, slick-ums could also be used to disrupt resupply, provide blockage in maneuver warfare, or temporarily disable runways.

71. On the threat posed by information warfare, see OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR ACQUISITION & TECHNOLOGY, REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE ON INFORMATION WARFARE DEFENSE, Nov. 1996, esp. app. B (Threat Assessment).

72. Space systems used during the war are described in CONDUCT OF THE PERSIAN GULF WAR, *supra* note 53, at 801–806.

73. On this point, see Gray, *supra* note 27, at 307.

74. SPACE COMMAND VISION, *supra* note 7, at n.p.

75. *Id.* at n.p. The Air Force's Scientific Advisory Board concurs: "Capabilities to defend our own space based resources and to disrupt and degrade that of an enemy will be needed sooner or later in the 21st century." NEW WORLD VISTAS, *supra* note 44, at 61.

76. NEW WORLD VISTAS, *supra* note 44, at 47. The Board has further noted that "[t]he future Force will, eventually, contain space, ground, and airborne weapons that can project



photon energy, kinetic energy, and information against space and ground assets. Many space and information weapons will destroy. Others will confuse the enemy and weave the 'bodyguard of lies' that will protect our forces." *Id.* at 11.

77. Owens, *supra* note 15, at 38.

78. Global Partnership is one of Space Command's four operational concepts. SPACE COMMAND VISION, *supra* note 7, at n.p. This adds another dimension to the complexity—nationality. For example, consider neutrality. What if a belligerent is receiving dual-use data (e.g., weather) from a satellite owned by a neutral or a multinational corporation with neutral partners? Can it be attacked? Can the U.S. use data received from a satellite that it shares with a neutral? Such complexity will only be exacerbated in the next century as space commercialization explodes.

79. For superb summaries of the current law of armed conflict, see LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* (1993) and *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* (Dieter Fleck ed., 1995). The latter work reproduces the German Law of War Manual [Joint Services regulations (Zdv) 15/2, Aug. 1992] and provides extended commentary thereon by international law experts.

80. U.N. CHARTER art. 2(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

81. It would appear that the drafters of the Charter did not intend the term "force" to apply beyond armed force. Albrecht Randelzhofer, *Article 2(4)*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 106, 112 (Bruno Simma ed., 1994).

82. Under Article 39 of Chapter VII, the Security Council determines whether a "threat to the peace, breach of the peace, or act of aggression" exists. When the Council finds one does, it may "call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable." *Id.*, art. 40. It may also directly impose "measures not involving the use of armed force," such as interrupting aerial "means of communication." *Id.*, art. 41. When the Security Council determines that non-forceful measures would be or have proved inadequate, it may authorize the United Nations, regional organizations, or member States to use force under Article 42 to restore or maintain peace. Force includes "such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security . . . [including] . . . demonstrations, blockades, and other operations by air, sea, or land forces of Members of the United Nations." *Id.*, art. 42. For a discussion of the terms "threat, breach, and aggression," see Jochen Frowein, *Article 39*, in Simma, *supra* note 81, 605, 608–12.

83. U.N. CHARTER art. 51:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

For a discussion of "armed attack," see Albrecht Randelzhofer, *Article 51*, in Simma, *supra* note 81, at 661, 668–51. Numerous international agreements and pronouncements have reaffirmed this right of self-defense since ratification of the U.N. Charter. See, e.g., Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 3, T.I.A.S. No. 1838, 21 U.N.T.S. 77 (Rio Treaty); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV),

princ. 1, U.N. Doc. A/8028 (1971), 9 I.L.M. 1292 (1970); North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 34 U.N.T.S. 243; Treaty of Friendship, Cooperation and Mutual Assistance, Oct. 10, 1955, art. 4, 219 U.N.T.S. 3 (Warsaw Pact Treaty).

84. Anticipatory self-defense is self-defense which occurs immediately prior to the attack. The most widely accepted standard is that articulated by U.S. Secretary of State Daniel Webster with regard to the *Caroline* incident. The *Caroline* incident involved a Canadian insurrection in 1837. After being defeated, the insurgents retreated into the United States, where they recruited more insurgents and planned further operations. The *Caroline* was being used by the rebels. British troops crossed the border and destroyed the vessel by setting her afire and sending her over Niagara Falls. Britain justified the action on the grounds that the United States was not enforcing its laws along the frontier and that the action was a legitimate exercise of self-defense. Webster replied that self-defense was to "be confined to cases in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation." Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), reprinted in JOHN BASSETT MOORE, 2 A DIGEST OF INTERNATIONAL LAW 411, 412. Professor Yoram Dinstein adopts the terminology "interceptive" self-defense. It occurs after the other side has "committed itself to an armed attack in an ostensibly irrevocable way." He argues that interceptive self-defense is consistent with Article 51. YORAM DINSTEIN, WAR, AGGRESSION, AND SELF DEFENCE 190 (2d ed. 1994).

85. On economic sanctions, see Paul S. Szasz, *The Law of Economic Sanctions*, in this volume.

86. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4, 103: "There appears now to be general agreement on the nature of the acts which can be treated as constituting an armed attack. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also 'the sending by or on behalf of a State of armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another State of such gravity as it amounts to' (*inter alia*) an actual armed attack conducted by regular forces, or its substantial involvement therein."

87. On this point, see generally Donald A. Daniel, *The Evolution of Naval Power to the Year 2010*, NAVAL WAR COLL. REV., Summer 1995, at 62.

88. In order to act in self-defense, U.S. forces must face either a hostile act or a demonstration of hostile intent by an opponent. Hostile intent is defined as

the threat of imminent use of force by a foreign force or terrorist unit, or organization against the United States and US national interests, US forces, and in certain circumstances, US citizens, their property, US commercial assets, or other designated non-US forces, foreign nationals and their property. When hostile intent is present, the right exists to use proportional force, including armed force, in self-defense by all necessary means available to deter or neutralize the potential attacker or, if necessary, to destroy the threat. A determination that hostile intent exists and requires the use of proportional force in self-defense must be based on convincing evidence that an attack is imminent.

Chairman, Joint Chiefs of Staff Instruction (CJCSI) 3121.02, Standing Rules of Engagement for United States Forces (1994), at GL-9. This is a classified document, but large portions, including this quote, are unclassified.

89. "Instant and overwhelming" is the *Caroline* standard. See *supra* note 84.

90. Actually, the Administration's statements seemed to include justifications based on both anticipatory self-defense and retaliation. For example, in the President's national address on the subject, he initially appeared to use reprisal as the basis for the attack: "Several weeks ago in New Orleans, I warned Colonel Qadhafi we would hold his regime accountable for any new terrorist attacks launched against American citizens. More recently, I made it clear we would



respond as soon as we determined conclusively who was responsible." He then offered a classic self-defense justification: "Self-defense is not only our right, it is our duty. It is the purpose behind the mission undertaken tonight—a mission fully consistent with Article 51 of the UN Charter." President Ronald Reagan, Address to the Nation (Apr. 14, 1986), in DEP'T ST. BULL., June 1986, at 1–2. See also *White House Statement*, DEP'T ST. BULL., June 1986, at 1. Much attention has been paid to the fact that the United States believed Libya was planning attacks on up to thirty U.S. diplomatic facilities worldwide. *Joint News Conference by George Schultz, Secretary of State, and Casper Weinberger, Secretary of Defense* (Apr. 14, 1986), in DEP'T ST. BULL., June 1986, at 3.

91. The distinction between international and non-international armed conflict is not always clear. Protocol II Additional to the Geneva Conventions, an agreement designed to govern the latter, describes non-international armed conflict as "armed conflicts . . . which take place in the territory of a [party to the Convention] between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations." Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, art. 1 (1), U.N. Doc. A/32/144, Annex II (1977), 16 I.L.M. 1442 (1977), [hereinafter Protocol II]. International armed conflict is that which arises between States (or other subjects of international law). See, e.g., Common Article 2 to the Geneva Conventions: "The present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if a state of war is not recognized by one of them." Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 2, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, art. 2, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3316, 75 U.N. T.S. 135 [hereinafter Geneva Convention III]; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. Additional Protocol I, which supplements the Geneva Conventions with regard to international armed conflict, simply refers back to Common Article 2. Protocol Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of International Armed Conflict, June 8, 1977, art. 1 (3), U.N. Doc. A/32/144, Annex I (1977), reprinted in 16 I.L.M. 1391 (1977) [hereinafter Protocol I]. In a somewhat controversial provision, Protocol I includes as *international* armed conflicts "armed conflicts in which peoples are fighting against colonial domination and alien occupation and racist regimes in the exercise of their right of self-determination." *Id.*, art. 1 (4). Note that "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" are not armed conflict, either international or non-international. Protocol II, *supra*, art. 1 (2).

92. Article 3 of each of the Geneva Conventions is identical and provides basic protections for "persons taking no part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause." Geneva Conventions I, II, III, IV, *supra* note 91, art. 3. The remainder of those conventions address international armed conflicts.

93. Compare *Prosecutor v. Drazen Erdemović*, Case No. IT-96-22-A, Appeals Chamber Judgment, Oct. 7, 1997 (finding an international conflict vis-à-vis the Bosnian Croats) with *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-T, Opinion and Judgment, May 7, 1997. For a

discussion of these cases, see Leslie C. Green, Erdemović-Tadić-Dokmanović: Jurisdiction and Early Practice of the Yugoslav War Crimes Tribunal (unpublished manuscript on file with author, forthcoming in LESLIE C. GREEN, FURTHER ESSAYS ON THE MODERN LAW OF WAR (Transnational Pub., 1998)).

94. See William J. Fenrick, *The Development of the Law of Armed Conflict through the Jurisprudence of the International Criminal Tribunal for the former Yugoslavia*, in this volume.

95. Protocol I, *supra* note 91, art. 48: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and civilian objects and military objectives and shall direct their operations only against military objectives."

96. Protocol I, *supra* note 91, art. 48.

97. *Id.*, art. 52(2). The term "object" includes combatants within its scope. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 635 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter COMMENTARY]. Military advantage should be evaluated in terms of the entire campaign/war, not simply the advantage which accrues directly to the attacking force. On this point, see Stefan Oeter, *Methods and Means of Combat*, in Fleck, *supra* note 79, at 105.

98. COMMENTARY, *supra* note 97, at 635-36.

99. Protocol I, *supra* note 91, art. 51(2).

100. *Id.*, art. 51(3).

101. COMMENTARY, *supra* note 97, at 619.

102. Protocol I, *supra* note 91, art. 50(1-2).

103. For an argument directly opposing the ICRC's restrictive approach, see W. Hays Parks, *Air War and the Law of War*, 32 AIR FORCE L. REV. 1, 113-145 (1992).

104. For a general unofficial compilation of the U.S. views on Protocol I by then State Department attorneys, see Abraham D. Sofaer, AGORA: *The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 82 AM. J. INT'L L. 784 (1988); Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419 (1987).

105. Letter from DAJA-IA to Counselor for Defense Research and Engineering (Economics), Embassy of the Federal Republic of Germany (Jan. 22, 1988), *cited in* Parks, *supra* note 103, at 134.

106. U.S. NAVY/MARINE CORPS/COAST GUARD, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (NWP 1-14M, MCWP 5-2.1, COMDTPUB P5800.7), para. 8.1.1 (1995). The manual labels this a "statement of customary law," *citing* General Counsel, Dep't of Defense, letter of Sept. 22, 1972, *reprinted in* 67 AM. J. INT'L L. 123-24 (1973). The annotated version of NWP 1-14M specifically defers on the more controversial issue of "whether this rule permits attacks on war-sustaining cargo carried in neutral bottoms at sea, such as by Iraq on Iranian tankers carrying oil exported by Iran during the Iran-Iraq war." NWP 1-14M, *supra*, Annotated Version (1997), at 8-3 n.11.

107. Parties to Protocol I are obligated to "endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives." Protocol I, *supra* note 91, art. 58(a). However, even if a Party intentionally uses civilians as a shield, the attacker remains obligated to consider collateral damage and incidental injuries in their discrimination and proportionality calculations. *Id.*, art. 51(7-8).

108. The requirements for precautions are set forth in Protocol I, *supra* note 91, art. 57.



109. After attacking Kuwait, the Iraqis used Western and Kuwaiti hostages to shield their military sites from coalition air attacks. The non-Kuwaiti civilians were eventually released in December 1990 when the tactic resulted in near universal condemnation. CONDUCT OF THE PERSIAN GULF WAR, *supra* note 53, at 607–608. Using a civilian or other protected person in such a manner is a violation of Geneva Convention IV and Protocol I and constitutes a Grave Breach. Geneva Convention IV, *supra* note 91, arts. 29 & 149; Protocol I, *supra* note 91, arts. 75(2)(c) & 85(2). Other examples included the dispersal of helicopters to residential areas, placing surface-to-air missiles in a school in a populated area of Kuwait City, and placement of fighter aircraft next to the Temple of Ur. CONDUCT OF THE PERSIAN GULF WAR, *supra*, at 613–15.

110. Even if a Party intentionally uses civilians as a shield, a specific violation of Protocol I, the attacking party remains obligated to consider collateral damage and incidental injuries in their discrimination and proportionality calculations. Protocol I, *supra* note 91, art. 51(7–8).

111. Perfidy consists of “acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence.” Protocol I, *supra* note 91, art. 37. In addition to Protocol I, perfidy is forbidden in the Hague IV Annexed Regulations. Hague Convention IV Respecting the Laws and Customs of War on Land, with Annexed Regulations, Oct. 18, 1907, art. 23(F), 36 Stat. 2227, 1 Bevans 631.

112. Hague Convention IV, *supra* note 111, art. 1.

113. Geneva Convention IV, *supra* note 91, art. 4A(2).

114. The requirement that combatants distinguish themselves from non-combatants through use of a distinctive emblem dates back to the Brussels Declaration of 1874. Project on an International Declaration concerning the Laws and Customs of War, *reprinted in* Schindler & Toman, *supra* note 2, at 25. With regard to Protocol I, according to the Rapporteur, the “exception recognized that situations could occur in occupied territory and in wars of national liberation in which a guerrilla fighter could not distinguish himself throughout his military operations and still retain any chance of success.” XV Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974–1974, at 453, CDDH/407/Rev.1, para. 19.

115. Protocol I, *supra* note 91, art. 44(3). The United States opposes this provision on the ground that it will place civilians at greater risk by making it harder for military personnel to distinguish them from lawful combatants. 1 U.S. AIR FORCE, OFFICE OF THE JUDGE ADVOCATE GENERAL, OPERATIONS LAW DEPLOYMENT DESKBOOK (n.d.), tab 12, para. 1.7.6.1. Thus, by the U.S. view, those who fail to comply with the requirements of Hague become illegal combatants who can be targeted and, if determined to be illegal combatants by an appropriate Tribunal, tried and punished. NWP 1–14M, *supra* note 106, para. 12.7.1 (1995).

116. Protocol I, *supra* note 91, art. 51(5)(b) defines it as “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” A similar prohibition is found in the Article 57 requirements for precautions in attack. *Id.*, art. 57(2)(a)(iii) & 57(2)(b). On proportionality generally, see William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91 (1982); Judith G. Gardam, *Proportionality and Force in International Law*, 87 AM. J. INTL L. 391 (1993).

117. The targeting policy of the Coalition forces during the Persian Gulf War was clearly moving in this direction. For instance, only PGMs were used against targets in downtown Baghdad, to avoid collateral damage and incidental injury. CONDUCT OF THE PERSIAN GULF WAR, *supra* note 53, at 97–98.

118. Described in *id.* at 615.

119. For a description of current aerial weaponry and their employment techniques, see Robert A. Coe & Michael N. Schmitt, *Fighter Ops for Shoe Clerks*, 42 AIR FORCE L. REV. 49 (1997).

120. Protocol I, *supra* note 91, arts. 51(5)(b), 57(2)(b).

121. For instance, Article 57 requires "those who plan or decide upon an attack" to "do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection" and to "take all feasible precautions in the choices of means and methods of attack (emphasis added)." Protocol I, *supra* note 91, art. 57(2)(i–ii). The ICRC Commentary imposes a fairly demanding standard:

[T]he identification of the objective, particularly when it is located at a great distance, should be carried out with great care. Admittedly, those who plan or decide upon such an attack will base their decision on information given them, and they cannot be expected to have personal knowledge of the objective to be attacked and of its exact nature. However, this does not detract from their responsibility, and in case of doubt, even if there is only a slight doubt, they must call for additional information and if need be give orders for further reconnaissance. . . . The evaluation of the information obtained must include a serious check of its accuracy [emphasis added].

COMMENTARY, *supra* note 97, at 680–81.

122. For an excellent discussion of attacks on electrical grids, see James W. Crawford, *The Law of Noncombatant Immunity and the Targeting of National Electrical Power Systems*, FLETCHER FORUM OF WORLD AFF., Summer/Fall 1997, at 101. For criticism of the air campaign's effect on the civilian population, see Roger Normand & Chris af Jochnick, *The Legitimation of Violence: A Critical Analysis of the Gulf War*, 35 HARVARD J. INT'L L. 387, 399–402 (1994); William M. Arkin, *The Environmental Threat of Military Operations*, in PROTECTION OF THE ENVIRONMENT IN ARMED CONFLICT 116 (Richard J. Grunawalt et al. eds, 1996).

123. Paradoxically, reverberating effects may enhance the deterrent or compellant effect of an action, for the greater the impact, the more likely a target State's decision-making will be affected.

124. On the subject of necessity generally, see H. McCoubrey, *The Nature of the Modern Doctrine of Military Necessity*, 30 REVUE DE DROIT MILITAIRE ET DE DROIT DE LA GUERRE 216 (1991); DE MULINEN, *supra* note 29, at 82–84.

125. Hostages (U.S. v. List), 11 T.W.C. 759, 1248–54 (1950).

126. For an argument that the Coalition violated the principle of necessity, see Normand & af Jochnick, *supra* note 122, at 402–409.

127. Declaration of St. Petersburg, 1868, reprinted in Schindler & Toman, *supra* note 2, at 101. The principle is also expressed in Protocol I: "It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering." Protocol I, *supra* note 91, art. 35(2).

128. This phrase is drawn from the Martens Clause. Found in Hague IV, it provides:

Until a more complete code of laws has been issued, the high Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and belligerents remain under the protection and the rule of principles of the laws of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of public conscience.

Hague IV, *supra* note 111, pmb. A similar provision is found in Protocol I, *supra* note 91, art. 1(2).

129. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, U.N. Doc. CD/CW/WP.400/Rev.1, reprinted in 32 I.L.M. 800 (1993).



130. Biological Weapons Convention, *supra* note 1.

131. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious Or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 7, *reprinted in* 19 I.L.M. 1523 (1980).

132. Geneva Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed Excessively Injurious Or to Have Indiscriminate Effects, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), 19 I.L.M. 1529 (1980), as amended on May 3, 1996, 35 I.L.M. 1209 (1996). In 1997 antipersonnel mines were banned completely (for Parties) in the Ottawa Treaty on Personnel Mines. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, available online at ICRC website, *supra* note 3. The Convention is not yet in force.

133. Protocol IV, *supra* note 1. Extensive discussion of the laser and mines issues can be found at the ICRC's homepage website. <[http://www.icrc.org/unicc/icrcnews.nsf/DocIndex/home\\_eng?OpenDocument](http://www.icrc.org/unicc/icrcnews.nsf/DocIndex/home_eng?OpenDocument)>.

134. Biological Weapons Convention, *supra* note 1, art. 1.

135. Chemical Weapons Convention, *supra* note 129, art. 2.

136. On military activities in space, see Peter Jankowitsch, *Legal Aspects of Military Space Activities*, in *SPACE LAW: DEVELOPMENT AND SCOPE* 143 (Nandasiri Jasentuliyana ed., 1992); Richard A. Morgan, *Military Use of Commercial Communications Satellites: A New Look at the Outer Space Treaty and "Peaceful Purposes,"* 60 J. AIR L. & COM. 237 (1994); Colleen Sullivan, *The Prevention of an Arms Race in Outer Space: An Emerging Principle of International Law*, 4 TEMP. INT'L & COMP. L.J. 211 (1990).

137. Treaty on the Principles Governing the Activities of States in the Exploitation and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan, 27, 1967, arts. I & III, 18 U.S.T. 2410, 610 U.N.T.S. 205, *reprinted in* 6 I.L.M. 386 (1967).

138. This was the position taken by Judge Benjamin Cardozo in *Techt v. Hughes*: "international law to-day does not preserve treaties or annul them, regardless of the effects produced. It deals with such problems pragmatically, preserving or annulling as the necessities of war exact. It establishes standards, but it does not fetter itself with rules." 128 N.E. 185, 191 (N.Y.), *cert. denied*, 254 U.S. 643 (1920).

139. For a brief discussion of the approaches, see Michael N. Schmitt, *Green War: An Assessment of the Environmental Law of International Armed Conflict*, 22 YALE J. INT'L L. 1 (1997).

140. NWP 1-14 Annotated, *supra* note 106, at 2-38, n.114.

141. The requirement to train military personnel in the law of armed conflict is found in many instruments. See, e.g., Hague IV, *supra* note 111, art. 1; Geneva Convention I, *supra* note 91, art. 47; Geneva Convention II, *supra* note 91, art. 48; Geneva Convention III, *supra* note 91, art. 127; Geneva convention IV, *supra* note 91, art. 144; Protocol I, *supra* note 91, arts. 83 & 87; Protocol II, *supra* note 91, art. 19; Conventional Weapons Convention, *supra* note 131, art. 6. On the role of legal advisers, see LESLIE C. GREEN, *ESSAYS ON THE MODERN LAW OF WAR*, ch. 4 (1985).

142. Since the Persian Gulf War, the U.S. military has invested heavily in smart weapons. For example, the two U.S. carriers deployed to the Persian Gulf during the February 1998 crisis carried with them more smart weapons than all six of the carriers deployed during the war. Bradley Graham, *New Weapons Give Navy Top Air Role This Time*, WASH. POST, Feb. 12, 1998, at 1, 25.

143. U.S. policy on this issue is described in White House Fact Sheet, U.S. Efforts to Address the Problem of Anti-Personnel Landmines, Sept. 17, 1997, available online at <<http://www.state.gov/www/global/arms/index.html>>.

# XVI

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## **The Development of International Law with Respect to the Law Enforcement Roles of Navies and Coast Guards in Peacetime**

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Ivan Shearer

INTERNATIONAL LAW HAS, at least since the time of Grotius, recognized the right of States to regulate the seas adjacent to their coasts and to enforce their laws against foreign vessels. The rights of regulation and enforcement included principally the subjects of customs, fisheries, health and immigration. Until the twentieth century, coastal States were primarily concerned with the protection of their territory, including their neutrality in cases of war between other States. In the present century, additional concerns have arisen: the conservation and management of the diminishing living resources of the sea and seabed, the exploration and exploitation of the nonliving resources of the seabed, and the protection and preservation of the marine and coastal environment.

The modern international law of the sea, reflected in the United Nations Convention on the Law of the Sea, 1982, allows States to assert and exercise a multitude of sovereign rights and jurisdictions in zones beyond the territorial



sea. The Convention is comprehensive and detailed in these respects. In respect of the manner of enforcement of these sovereign rights and jurisdictions, however, the Convention is for the most part silent. Resort must be had to principles and rules of customary international law in assessing the rights and responsibilities of States in the enforcement of their powers and rights under the Convention.

In the exercise of those powers of regulation that cannot, or cannot always, be carried out by authorities on land, States have used a variety of vessels and officials. Some States deploy their navies and air forces in this role, supplementing them where necessary with vessels and officials operated and staffed by such agencies as customs, environment, fisheries, health, and immigration departments. Other States have a designated coast guard service, which carries out all law enforcement activities at sea in peacetime.

Where navies are used in peacetime law enforcement roles, it is obvious that much of the training directed towards their primary task is also relevant to the task of policing maritime zones. In particular, the principle of graduated force<sup>1</sup> has application in the exercise of the right of approach, stopping, boarding, searching and seizing foreign merchant vessels. Rules of engagement and special procedures are regularly rehearsed and exercised. Where a coast guard or other governmental enforcement agency is employed in these roles, it too will, or should, be guided by the same principles and rules. Moreover, in time of armed conflict these maritime forces are likely to be integrated into the war effort, and their crews must be capable of swift adaptation to traditional naval roles. The cross-fertilization of experience between roles, and between the forces employed in those roles, ought to be consciously encouraged in times of peace.

The modern international law of the sea, with its concession of expansive zones of national sovereignty or jurisdiction, together with its concerns for access to natural resources, navigational freedoms, and the protection of the natural environment, presents many possibilities for dispute between States. Unlawful, unjustifiably forceful, or clumsy law enforcement can be the occasion not only of disputes but even of armed conflict.

States take up their rights of sovereignty and jurisdiction in their maritime zones and exercise them in accordance with their domestic laws. These laws may or may not be in accordance with international law. In some cases, domestic laws with respect to enforcement may date back to earlier times and may be inconsistent with modern international law, or, being administered by different departments, lack congruity with other domestic laws.

A distinction is commonly observed in the assertion and exercise of sovereign rights and jurisdiction in national maritime zones and on the high seas between nationals and national vessels of the enforcing State, and foreign vessels and persons. This distinction derives from two considerations. In the first place, international law does not, in general, concern itself with matters arising between a State and its own citizens, especially in relation to the enforcement of laws to which the citizen owes obedience. In the second place, constitutional considerations may arise as to the use of the regular armed forces, as distinct from police and other civilian governmental agencies, in the enforcement of laws against citizens.

### **The Powers and Manner of Enforcement of Coastal State Rights and Jurisdictions under the United Nations Convention on the Law of the Sea, 1982 (LOS Convention)**

There was an evident reluctance at the Third United Nations Conference on the Law of the Sea (UNCLOS III) to formulate in detail prescriptions of the manner of enforcement of the various sovereign rights and jurisdictions accorded to coastal States by the resulting Convention. Where the Convention incorporates the texts of the four Geneva Conventions of 1958, the same euphemisms or evasions are repeated. In the parts of the LOS Convention that are new, references are scattered and are not harmonious, reflecting the division of UNCLOS III into three main committees and various working groups.

**The Territorial Sea.** Since a coastal State's full sovereignty extends to its territorial sea, in principle it enjoys plenary powers of enforcement of its laws in those waters. However, in view of the international community's interest in the right of innocent passage through territorial seas, and especially in the right of transit passage through, over, and under those parts of the territorial sea that comprise straits used for international navigation, certain restrictions are placed on enforcement powers.

In relation to innocent passage, there is a general restriction that a coastal State "should not" exercise its criminal jurisdiction on board a foreign vessel to arrest any person or conduct an investigation unless the consequences of the crime, committed on board the foreign vessel while in passage, extend to the coastal State; the crime affects the peace of the coastal State or the good order of the territorial sea; assistance has been requested by the master of the vessel or the authorities of the flag State; or such measures are necessary for the



suppression of the illicit traffic in narcotics. It will be noted that the words used are "should not" and are thus not an outright prohibition (LOS Convention, art. 27(1)). However, this mild restriction does not apply to an arrest or investigation on board a vessel in the territorial sea after it has left the internal waters of the coastal State. Nor does it apply in respect of offenses committed against laws validly applying in the exclusive economic zone (EEZ), where the vessel has subsequently entered the territorial sea. The sole outright prohibition is of arrest and investigation on board a foreign vessel in innocent passage in respect of crimes committed on board before the vessel, proceeding from a foreign port, entered the territorial sea. An exception is enforcement actions taken pursuant to laws applying in the EEZ and to certain marine pollution offenses, as allowed under Part XII of the LOS Convention.

By contrast, in relation to the exercise of civil jurisdiction by way of arrest or levy of execution against a vessel in innocent passage, the prohibition is made mandatory by the LOS Convention, Article 28(2), except in respect of obligations or liabilities assumed or incurred by the vessel itself in the course of or for the purpose of a voyage through the waters of the coastal State.<sup>2</sup>

It is axiomatic that in the territorial sea as elsewhere at sea and on land, the international law doctrine of sovereign immunity forbids any interference with, or attempt at law enforcement on board, a foreign warship or a government vessel in noncommercial service. However, it is unclear whether vessels exercising their rights of transit passage through straits have any degree of immunity from being stopped and boarded (or aircraft from being diverted and ordered to land).<sup>3</sup> There is no express provision in the Convention allowing for the enforcement—as distinct from the prescription—of coastal State laws. Article 34, dealing with the legal status of waters forming straits used for international navigation, does not entirely resolve the problem, since it is not clear whether it means that all other provisions relating to the territorial sea apply except insofar as they are inconsistent with a provision applying to transit passage, or whether it is speaking merely of prescription and not of enforcement, which is subject to the specific regime of Part III.<sup>4</sup> The undoubted implication is that such powers should be exercised with restraint and only be invoked, by analogy with Article 27, where there are significant effects on the coastal State, or under general international law by way of self-preservation in the face of an imminent peril. Article 38(3) provides that "any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of the Convention." This may be understood to bring in Article 25, allowing the coastal State to take the "necessary steps" in its territorial sea to prevent passage that is not innocent. The applicability of

Article 25 is made plausible by the consideration that, before the entry into force of the LOS Convention, the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, and customary international law, regarded straits transit passage as merely a nonsuspendable form of innocent passage. A generally cautious approach appears to be confirmed by the LOS Convention, Article 233, which provides for the exercise of enforcement powers specifically in relation to pollution offenses by vessels transiting straits only where the violation causes or threatens major damage to the marine environment of the straits. State practice under the Convention may clarify the matter in future. State practice before the Convention came into effect would support the existence of a general power to enforce laws against vessels transiting straits, at least where the offenses are serious.<sup>5</sup>

Nothing is said in the Convention generally about the manner of enforcement by the coastal State of its laws in the territorial sea. In relation to vessels in innocent passage, it provides that "the coastal State may take the necessary steps in the territorial sea to prevent passage which is not innocent." The expression "necessary steps" derives from the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, Article 16(1), and broadly encompasses the standard procedures of approach, stopping, boarding, investigation, and possible arrest. The word "prevent," however, if it stood alone and had no earlier history, might suggest that a coastal State had the power only to prevent non-innocent passage by, not arrest and punish, the foreign vessel. But such an interpretation would be inconsistent with the presumption of full residual sovereign powers in the territorial sea. It would also be contrary to the clear implications of Articles 27(5) and 220(2) of the LOS Convention, the latter provision relating to the enforcement of pollution laws in the territorial sea, including in relation to vessels in innocent passage. The power to "prevent" merely offers the coastal State, in this context, a more agreeable alternative to arrest and prosecution of an offending vessel, that is, by barring its access or diverting it away from the territorial sea.<sup>6</sup>

**Archipelagic Waters.** Although the theory on which claims to archipelagic waters were made, beginning with Indonesia in the 1950s, would necessarily regard them as internal waters and thus even more firmly under exclusive coastal State sovereignty than territorial waters, the development and acceptance of the concept during UNCLOS III resulted in a substantial equating of archipelagic waters with territorial waters, and archipelagic sea lanes passage with transit passage through and over international straits. The wording of LOS Convention Article 49 on the legal status of archipelagic



waters is substantially identical with that of Articles 2 and 34. There is a right of innocent passage through archipelagic waters not included in archipelagic sea lanes, and the regime expressly incorporates by reference the whole of Part II, Section 3, of the Convention on innocent passage in the territorial sea (LOS Convention, art. 52(1)). Similarly, the regime of archipelagic sea lanes passage and overflight applies Articles 39, 40, 42 and 44 on transit passage through and over straits *mutatis mutandis* (LOS Convention, Art. 54). Whatever fine points of distinction between archipelagic sea lanes passage and straits transit passage there may be argued to exist,<sup>7</sup> from the point of view of law enforcement the legal environment of archipelagic waters is not substantially different from that of the territorial sea.

**The Contiguous Zone.** The contiguous zone, under the LOS Convention, may extend to a maximum breadth of twenty-four nautical miles from land or from territorial-sea baselines. It occupies the sea area lying between that limit and the outer limit of the territorial sea. In relation to the four kinds of laws applying to its land territory or its territorial sea, in which prevention or enforcement activities may be carried out in its contiguous zone (customs, fiscal, immigration, and sanitary laws), the coastal State "may exercise the control necessary to" prevent infringement of those laws by inbound vessels or to punish infringements committed by vessels in its territory or territorial sea when they are outward bound in the contiguous zone (LOS Convention, art. 33).

The phrase "may exercise the control necessary to" in Article 33 should be compared with the phrase "may take the necessary steps" in Article 25(1), applying to the territorial sea, discussed above. Is there a practical difference? It must be remembered that the contiguous zone is not a zone of coastal State sovereignty or even of coastal State jurisdiction; it is a police zone.<sup>8</sup> Its residual status, even taking into account that it is included in the exclusive economic zone, is that of high seas. As a consequence, the rights exercisable by the coastal State in its contiguous zone are of a distinct character and are to be accorded differently depending on whether the action taken is preventive or punitive. In the former case (inbound vessels), it is arguable that arrest is precluded, since by definition no offense has yet been committed. In the latter case (outbound vessels) an offense has been committed and may be dealt with accordingly; this requires no more qualification of coastal State powers than of hot pursuit, except that the pursuit need not have begun in the territorial sea.<sup>9</sup> The right to arrest inbound vessels in the contiguous zone in respect of apprehended immigration offenses was left open by the Privy Council in 1948

by reason of the fact that the vessel concerned was stateless;<sup>10</sup> the right to arrest may still be in doubt, but it might be cured by the enactment by a coastal State of a law applicable in its contiguous zone prohibiting navigation with the intention of breaching coastal State laws in its territorial sea or territory.<sup>11</sup>

**The Exclusive Economic Zone.** As might be expected from the limitation of a coastal State's legislative powers over its EEZ, and the high value placed on the freedoms of navigation enjoyed by other States in the zone (subject only to the rights and jurisdiction given the coastal State in relation to the natural resources of the zone and structures connected therewith), the specification of enforcement powers is expressed by the LOS Convention in notably circumscribed terms. Indeed, the very fact that enforcement powers are spelled out in Part V of the Convention, dealing with the regime of the EEZ, whereas they are merely assumed or implied in relation to the territorial sea, archipelagic waters, and the contiguous zone, indicates that they are regarded as more sensitive matters and are to be construed strictly.

A general limitation on enforcement of rights, imposed by Article 56(2) of the LOS Convention, is that "in exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention." This general limitation applies in respect of all the resources of the EEZ, not merely the living resources.

The specific powers of enforcement given to States in their EEZs by the Convention is, however, only in relation to the free-swimming living resources of the zone. LOS Convention, Article 73 provides:

1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.

2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.

3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.



4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.

It is to be noted that Article 73 does not apply to the nonliving natural resources, such as gas, oil, and minerals, nor to the living sedentary species of the zone, which are regarded as belonging to the regime of the continental shelf.<sup>12</sup> Because the sovereign rights of the coastal State over nonliving and sedentary resources of the EEZ (and of the continental shelf, where that shelf extends beyond the outer limit of the EEZ) are stated to be exclusive,<sup>13</sup> it was thought unnecessary at UNCLOS III to give to coastal States express power to enforce those rights. The Geneva Convention on the Continental Shelf of 1958 is similarly silent; the power to enforce is implicit.

The reason why the power and manner of enforcement by coastal States of their rights in the water column of their EEZs should be stated explicitly, whereas in other zones of national maritime sovereignty or jurisdiction those powers are implicit, is that the EEZ is governed by an artificially created regime<sup>14</sup> that required the striking of a delicate balance between coastal State interests in conserving and managing living natural resources and the interests of other States in the traditional freedoms of navigation. To underline this point, the LOS Convention provides that in relation to disputes concerning the release of arrested vessels, compulsory jurisdiction is given to the courts and tribunals specified in Article 287, or, failing agreement on another court or tribunal, to the International Tribunal for the Law of the Sea (LOS Convention, Art. 292).<sup>15</sup>

Separate consideration will be given below to the special position with regard to the enforcement of pollution laws in the EEZ.

**The High Seas.** The high seas, being regarded from the time of Grotius onward as either *res nullius* or *res communis* and incapable of appropriation by any State, are an area in which in principle there is no right by any State to interfere with the free navigation of vessels and aircraft. The exceptions are set out in Article 110 of the LOS Convention:

- Vessels of the same nationality as the intercepting warship or aircraft. The exception also applies to vessels which, although flying a foreign flag or refusing to show a flag, are in reality vessels of the nationality of the intercepting State.
- Vessels without a nationality. These may include unregistered vessels whose national origins or connections are uncertain. Vessels sailing under two

or more flags, displaying them according to convenience, may be assimilated to vessels without a nationality.<sup>16</sup> This reference to “convenience” is not to be confused with the popular expression “flags of convenience,” which refers to vessels registered in countries having open registries or favorable or more relaxed registration rules. These vessels do have the nationality of the State of registration, notwithstanding that in some cases the control exercised by the flag State is not as effective as it ought to be.<sup>17</sup>

- Vessels engaged in piracy, the slave trade, or unauthorized broadcasting.
- Where the acts of interference derive from powers conferred by treaty, either a bilateral treaty between the intercepting State and the flag State, or a multilateral treaty.<sup>18</sup>

There is a right for warships to verify the flag in any of the cases above. But if suspicions prove to be unfounded, and the intercepted vessel has not committed any act justifying them, that vessel is entitled to compensation for any resulting loss or damage.<sup>19</sup>

The 1982 LOS Convention does not deal with the law of armed conflict. Hence it must also be taken into account that acts of interception, boarding, and arrest may take place on the high seas in the exercise of belligerent rights, in self-defense, or in execution of decisions of the United Nations Security Council.

**Hot Pursuit.** International law allows for the hot pursuit of vessels in the high seas, and arrest there, where an offense has been committed on the land territory, internal waters, the territorial sea, or in the EEZ of the pursuing State. Where the hot pursuit begins in the contiguous zone, it may be conducted only in respect of violations of the rights for which that zone was established. The position is the same in relation to pursuit beginning in the EEZ. Pursuit may only be commenced after a visual or auditory signal has been given at a distance which enables it to be seen or heard by the foreign ship. The right of hot pursuit terminates when the pursued vessel enters the territorial sea of its own or of a third State.<sup>20</sup> There is no reason to terminate the pursuit merely because the pursued vessel enters the EEZ of its own or of a third State.

Although the article on hot pursuit in the Convention appears only in Part VII (the High Seas), it must be remembered that this Part applies also to the EEZ, by reason of Article 58(2), insofar as its provisions are not incompatible with the regime of the EEZ. Hence, a right of hot pursuit may begin in the territorial sea or contiguous zone and end in the EEZ.



According to customary international law the pursuit must be "hot and continuous," that is, sight (which can include identification on radar) must not be lost or interrupted.<sup>21</sup> Where pursuit is begun by an aircraft, the Convention provides that it must be continued until a warship or another aircraft can take over the pursuit without interruption. It is not enough for the aircraft merely to record a sighting; it must give a signal to the delinquent vessel to stop. The position is taken in two Australian enactments that "the pursuit of a person or a boat is not taken to be terminated or substantially interrupted only because the officer or officers concerned lose sight [defined to include losing output from a radar or other sensing device] of the person or boat."<sup>22</sup> Although this position may seem a generous interpretation of customary international law, it is probably in accordance with modern realities.

***Offenses against Marine Pollution Laws.*** The protection and preservation of the marine environment were regarded as such important issues at UNCLOS III that a separate Part of the Convention (Part XII) is devoted to the subject.

The essential scheme of the LOS Convention, relies on three enforcement authorities in relation to pollution offenses: the flag State of the delinquent vessel; the port State visited by the delinquent vessel after the offense; and the coastal State whose laws have been violated. It is evident from the provisions of Part XII of the Convention that in the interests of freedom of navigation, these alternatives are in descending order of preference: Articles 217, 218, and 220.

Under this scheme the flag State of the delinquent vessel always has jurisdiction to prosecute its own vessel, wherever the offenses may have occurred, and it must do so when violations of national laws adopted in accordance with applicable rules and standards (principally the Conventions sponsored by the International Maritime Organization) have occurred. The port State's jurisdiction is mainly concerned with investigation and reporting to the flag State, but it may institute proceedings itself at the request of the flag State or of the coastal State affected. It may also institute proceedings if it is affected in its capacity as a coastal State, where its own territorial waters or EEZ have been polluted.

Coastal State powers over polluting foreign vessels are set out in Article 220. This article is arranged in such a way as to require a higher threshold to be crossed before enforcement action can be taken the farther from the coast the offense is detected. If the delinquent vessel is voluntarily within a port of the coastal State affected, proceedings may be brought in respect of pollution offenses committed in the territorial sea or the EEZ of that State. If the vessel is navigating in the territorial sea of the coastal State and there are "clear grounds

for believing" that it has committed a pollution offense in the territorial sea, the coastal State may apprehend and prosecute. If, however, the vessel is navigating in the territorial sea or the EEZ and there are "clear grounds for believing" that an offense was committed in the EEZ of the coastal State, that State may not institute proceedings but may only require the vessel to give information regarding its identity and its last and next ports of call (i.e., in order to facilitate a prosecution by either the flag State or the port State). However, in the last set of circumstances, if the violation in the EEZ has resulted in a substantial discharge causing or threatening significant pollution of the marine environment, the coastal State may undertake a physical inspection of the vessel, but still not prosecute. But finally, if there is "clear objective evidence" that a vessel in the situation of the last two cases has caused "major damage or threat of damage to the coastline or related interests of the coastal State, or to any of the resources of its territorial sea or exclusive economic zone," then—and only then—may the coastal State prosecute in respect of pollution offenses committed in its EEZ.

The flag State of the delinquent vessel may step in under Article 228 of the Convention and assume jurisdiction itself where a coastal State has already instituted proceedings in relation to pollution offenses in its EEZ, provided it does so within six months. In that event the coastal State must suspend its own proceedings, unless those proceedings "relate to a case of major damage to the coastal State, or the flag State in question has repeatedly disregarded its obligation to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels."

An exception to all of the above is the case of dumping. The term "dumping" is not defined in Articles 210 and 216 of the LOS Convention except by way of reference to the "international rules and standards established through competent international organizations or diplomatic conference for the prevention, reduction and control of pollution of the marine environment by dumping." At present, the chief such international instrument is the London Dumping Convention of 1972,<sup>23</sup> which lists prohibited and restricted substances in annexes. In the case of dumping (which is a deliberate and not a negligent activity), the coastal State may enforce its laws in respect of offenses committed in its territorial sea, its EEZ, or on its continental shelf, notwithstanding that the flag State may also have instituted proceedings.

The implications of these purely conventional provisions (their status as customary law has yet to be established) for freedom of navigation are obvious. Confrontation between States might well take the form of a denial by one State of navigation rights to the merchant ships, and especially oil tankers, of



another on the pretext of pollution offenses. The provisions of the Convention make such denial transparently unlawful, except in the case of a deliberate act of dumping or a clearly established act of pollution of great magnitude.

The translation of the Convention rules into the national laws and operational procedures of States must be closely watched in future.<sup>24</sup> Even in the case of States whose laws automatically incorporate the terms of international conventions, duly ratified, the terms of the articles discussed above may be subject to varying interpretations.

### **The Use of Force Against Delinquent Vessels**

The LOS Convention is markedly silent on the specification of the degrees of force that may be used against vessels that refuse to stop when ordered to bring to, or resist boarding, search, or arrest. All of the provisions of the Convention that authorize or imply such police measures appear to assume that the delinquent vessel will meekly submit to "enforcement measures" or "necessary steps." There was a disinclination at UNCLOS III to discuss such distasteful matters.

Guidance must therefore be sought in customary international law and from general principles of law. The general international law rule, applicable to self-defense and police-type measures alike, is that no more force may be used than is strictly necessary to achieve the legitimate objective and is proportionate and reasonable in all the circumstances. In respect of police-type enforcement actions, evidence of State practice tends to be anecdotal and variable, with some States resorting to the immediate use of weapons to compel submission, while others are more patient in exhausting peaceful means.<sup>25</sup>

The scant arbitral decisions on the point support the latter approach. The *I'm Alone*<sup>26</sup> was an arbitration in 1933–1935 between Canada and the United States concerning the sinking of a rum-runner and loss of life on board. It had failed to heave to after a lengthy chase and was fired into by a U.S. Coast Guard cutter. The arbitration commissioners held that necessary and reasonable force might be used for the purpose of boarding, searching, seizing, and bringing into port a suspect vessel; if sinking should occur incidentally as a result of the exercise of necessary and reasonable force, the pursuing vessel might be blameless. But in this case, the admittedly intentional sinking of the suspect vessel was not justified.

It is difficult to understand this decision in the light of the facts, which included a hot pursuit lasting two days during which the *I'm Alone* tried to outrun and outmaneuver its pursuer, except on the unstated basis that a

deliberate sinking will in no circumstances (other than in self-defense where violent resistance is employed or threatened) be warranted if the offense involved is a customs (i.e., purely regulatory) offense.<sup>27</sup> In other words, the proportionality principle requires the enforcing State to weigh the gravity of the offense against the value of human life. Rum-running (during the Prohibition era of the United States, which had ended just before the arbitration) did not strike the commissioners as sufficient to warrant such drastic action. They did not have to consider other cases. It is suggested that fisheries, revenue, immigration and other regulatory offenses would fall into the same category. So might pollution offenses. This is not only because sending a vessel with dangerous cargoes or wastes on board to the bottom might only compound the danger, but because of the Convention scheme, outlined above, under which the flag State can be required to take enforcement action against a delinquent vessel escaping immediate arrest. Other cases might justify the use of more vigorous, and perhaps ultimately deadly, force, such as piratical vessels, vessels carrying arms to dissidents in the enforcing State, or craft carrying large quantities of narcotic drugs. These cases might be argued to have the character of self-defense or self-preservation more than of enforcement of regulatory laws.

The *Red Crusader*<sup>28</sup> was also a case involving a regulatory offense, unlawful fishing. It was an arbitration between Denmark and the United Kingdom. In that case, a boarding party from the Danish fisheries patrol vessel had been overpowered and locked up by the crew of an arrested Scottish trawler. The trawler then turned and made a run for home waters. A lengthy chase ensued in which the Danish vessel fired repeated warning shots. Finally shots were fired at the bridge and into the hull of the trawler, despite which the trawler succeeded in escaping. The United Kingdom claimed that the force used had been excessive. The arbitral tribunal agreed, finding that the force used was "without proved necessity." It held that "other means should have been attempted, which, if duly persisted in, might have finally persuaded Skipper Wood to stop and revert to normal procedures."

The lesson of these arbitral cases is that force endangering human life is not justified, at least where purely regulatory offenses are concerned.<sup>29</sup> A premium is thus placed on the skill and equipment of enforcement vessels. Those vessels must have adequate visual and auditory signaling capacity, and speed, seakeeping capability, and maneuverability adequate to their task. In all cases, warning shots are to be used before fire is directed at unmanned parts of the pursued vessel. Even warning shots should not be used without first resorting to other methods of ordering the vessel to stop.<sup>30</sup> Methods other than gunfire are



to be used wherever possible, where the pursued vessel refuses to stop, e.g., by outmaneuvering, high-pressure water hoses to short out electrical systems, harpooned lines to foul the screws, etc. Instant ship-to-shore communications are also important in supplementing, where necessary, rules of engagement, and for receiving specific instructions from the responsible authorities.<sup>31</sup>

The sole reference in the LOS Convention to the degree of force to be used in enforcement measures appears in Article 225, which states: "In the exercise under this Convention of their powers of enforcement against foreign vessels, States shall not endanger the safety of navigation or otherwise create any hazard to a vessel, or bring it to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk."

In the light of what has been said, it may be wondered what "endangering safety" would be if the pursued vessel deliberately evaded a legitimate approach by an investigating or enforcing State vessel. The only sensible construction of Article 225 is to read it subject to the general international law principles of necessity, proportionality, and reasonableness, and not as a blanket prohibition against the use of any degree of force in any circumstances.

The case of offending civil aircraft raises a special consideration of what is necessary, proportionate, and reasonable. Aircraft in flight cannot be "stopped" in the way that surface vessels can be; also, they are extremely vulnerable to the exercise of the slightest degree of force. They may be intercepted and ordered to land at a designated airport, but they may not be fired on. Following the incident of the shooting down of a Korean Airlines passenger aircraft over Soviet territory in 1983, a Protocol relating to an Amendment to the Convention on Civil Aviation was adopted at Montreal in 1984.<sup>32</sup> Article 3 *bis* was added to the Convention in the following terms:

The contracting states recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of the aircraft must not be endangered. This provision shall not be interpreted as modifying in any manner the rights and obligations of States set forth in the Charter of the United Nations.

This provision clearly reserves the right of self-defense against armed attack under the UN Charter and customary international law.<sup>33</sup>

The possibility exists that there may emerge an international jurisprudence on the subject of law enforcement activities at sea. Part XV of the LOS Convention provides for the settlement of disputes arising under the Convention. It is a complex scheme, combining compulsory elements with a

number of limitations and optional exceptions. States may declare that they accept the jurisdiction of the International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal constituted in accordance with Annex VII of the Convention, or a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.<sup>34</sup>

The provisions of Part XV, Section 3, which contain the limitations and exceptions to the applicability of compulsory procedures entailing binding decisions, almost defy a reading that would make clear what is included in the obligation to submit to compulsory dispute settlement procedures as distinct from what is not.<sup>35</sup> Disputes concerning law enforcement activities are listed among the optional exceptions to compulsory dispute settlement, but only "in regard to the exercise of sovereign rights and jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3."<sup>36</sup> Those two paragraphs refer to marine scientific research and fisheries, respectively, but only so far as to exclude compulsory jurisdiction in respect of the exercise of coastal State discretions under the Convention. If a coastal State sought to impede navigation or overflight through the assertion of rights not granted by the Convention, there would be jurisdiction over the assertion, as well as over the manner of its exercise. Expressly included in the compulsory dispute settlement procedures are cases:

a) when it is alleged that a coastal State has acted in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in article 58; . . .

(c) when it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention.<sup>37</sup>

Thus a balance is struck in Part XV, as in Part V of the Convention in relation to the EEZ itself, between the sovereign rights and jurisdiction of coastal States and the interests of the international community in freedom of navigation.

The above provisions are directed to cases arising in the EEZ, since Article 297(1) refers to "the exercise by a coastal State of its sovereign rights or jurisdiction provided for in the Convention." The expression "sovereign rights or jurisdiction" is a term of art in the Convention and refers only to the EEZ and



continental shelf. It seems anomalous, but the provisions of Part XV limiting and excepting obligations to submit to binding dispute settlement procedures appear to leave entirely open disputes concerning the exercise of powers in the territorial sea and archipelagic waters, since in these areas the coastal State has sovereignty. Thus the enforcement of coastal State laws in territorial seas and archipelagic waters, including in relation to straits transit passage and archipelagic sea lanes passage, might be made the subject of compulsory reference to judicial or arbitral procedures.<sup>38</sup>

### **Restraints on the Use of Force Imposed by Domestic Law**

In proceedings for the enforcement of the various national laws applying in the maritime zones of the coastal State, the issue of the use of force may be raised. Damages in separate civil proceedings may be sought by an apprehended person or shipowner in relation to the use of excessive force, although this right may be limited by law.<sup>39</sup>

Under the common law, the act of State doctrine may be raised as a defense by a naval or other government officer against an action brought by a foreign citizen in the enforcing State's courts in respect of a tortious act committed against that person or a foreign vessel on the high seas or in a foreign place in the execution of duty.<sup>40</sup> If the tortious act (e.g., an excessively forceful arrest of a foreign fishing boat) occurs in territorial waters, however, the act of State doctrine will not apply. Territorial waters will be regarded as equivalent to territory for the purposes of the doctrine.<sup>41</sup> Will the contiguous zone and the exclusive economic zone be excluded also from the application of the act of State doctrine? There is no direct authority, but it is arguable that in the exercise of sovereign rights and jurisdiction within an area conceded by international law to the coastal State, and conducted pursuant to national laws which give effect to those rights and jurisdictions, that area should be treated as national territory for purposes of the act of State doctrine. Indirect support for this view is found in the United Kingdom Sea Fisheries Act of 1968,<sup>42</sup> which protects an officer from civil or criminal proceedings in execution of the Act in areas of proclaimed fishery limits.

It does not appear to be common practice, at least in countries of the common law, to provide for a statutory code of enforcement practices in relation to law enforcement at sea. Instead, law enforcement officers charged with maritime duties are guided by the common law and by any general statute governing the use of force in apprehending offenders.

The common law on the use of force in effecting an arrest can be taken from the following passage from the Criminal Code Bill Commission Report of the British Parliament (1879):<sup>43</sup>

We take one great principle of the common law to be, that though it sanctions the defence of a man's person, liberty and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from the force used is not disproportioned [sic] to the injury or mischief which it is intended to prevent.

The common law also distinguishes between the powers of arrest possessed by any person and the powers of arrest of constables.

These principles are reflected in legislation of Australia, Canada, and the United Kingdom with respect to the exercise of the power of arrest, legislation which is regarded in all three countries as extending to enforcement action under statutes applying in the various national maritime zones. However, there are differences in the legislation.

The Australian Crimes Act of 1914, section 3ZC, provides that "a person must not, in the course of arresting another person for an offence, use more force, or subject another person to greater indignity, than is necessary and reasonable to make the arrest or to prevent the escape of the other person after the arrest." For the purposes of customs, environmental, fisheries, and immigration laws, officials of the relevant departments, and naval officers, are merely "persons" within the meaning of this provision, subject to any other statutory powers they may have. The use of deadly force seems only to be envisaged at the hands of a constable:

(2) Without limiting the operation of subsection (1), a constable must not, in the course of arresting a person for an offence:

(a) do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the constable believes on reasonable grounds that doing that thing is necessary to protect the life or to prevent serious injury to another person (including the constable); or

(b) if the person is attempting to escape arrest by fleeing - do such a thing unless:



- (i) the constable believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the constable); and
- (ii) the person has, if practicable, been called upon to surrender and the constable believes on reasonable grounds that the person cannot be apprehended in any other manner.

It must be assumed to be deliberate that officers engaged in maritime law enforcement have not been given the express power possessed by constables to use deadly force in self-defense or for the protection of others. The question poses itself: why not? It could hardly be that private persons do not have a right of self-defense; the criminal law allows this. The reason presumably must be that in a code dealing with powers of arrest, private persons are not to be encouraged to get so close to offenders that the question arises. If this is so, the absence of constabulary powers in maritime law enforcement officers is unjustifiable.

Sections 25, 26, and 27 of the Canadian Criminal Code govern the use of force in effecting an arrest and are regarded as applying also to the enforcement of fisheries laws.<sup>44</sup> Under Section 25(3), the power possessed by any person to arrest another person, unlike under Australian law, does extend to "using force that is intended or is likely to cause death or grievous bodily harm [if] he believes on reasonable and probable grounds that it is necessary for the purpose of preserving himself or anyone under his protection from death or grievous bodily harm." Thus the defect under Australian law does not exist in Canada. Moreover, the powers given under the Code to "peace officers"—the statutory equivalent of a common law constable—are extended to members of the Canadian Forces by virtue of the definition of "peace officer" in the Code.<sup>45</sup> This results in their having powers which, if exercised at sea, especially in the EEZ, might engage Canada in responsibility under international law for using excessive force. The following section of the Code would, at all events, seem to conflict with the arbitral decisions in the *Red Crusader* and *I'm Alone* cases, discussed above:

25(4). A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and every one lawfully assisting the peace officer, is justified, if the person to be arrested takes flight to avoid arrest, in using as much force as is necessary to prevent escape by flight, unless the escape can be prevented by reasonable means in a less violent manner.

Fenrick comments that Section 25(4) gives “a somewhat distorted picture of the current state of Canadian law.” It has not been relied on in any reported cases of law enforcement at sea. He submits that “notwithstanding the wording of section 25(4) . . . HMC ships should not use force which is intended or is likely to cause death or grievous bodily harm for the purpose of enforcing fisheries legislation, unless such force is necessary for the defence of HMC ships or for the defence of some other person or vessel under her protection.”<sup>46</sup> In other words, he submits that international law should be followed in preference to the literal wording of the legislation.

Exceptionally, national law may itself provide for a special regime of law enforcement applying under a particular enactment. This is the case of the peculiar—one might say flagrant—provision of Australian and Canadian customs legislation inherited from a British model.

The Australian Customs Act of 1901, Section 184, headed “Power to pursue ships and aircraft”, provides:

(1) Where the master of a ship refuses or fails to comply with a request . . . to permit the ship to be boarded, the person in command of any ship in the service of the Commonwealth . . . or any aircraft in the service of the Commonwealth . . . may use his ship or aircraft to chase, and, after firing a gun as a signal, fire at or into the first-mentioned ship in order to compel it to be brought to for boarding.

The equivalent Canadian legislation, the Customs Act, R.S.C. 1970, chapter C-40, section 141(5), is in essentially the same terms.

Their common ancestor is the British Smuggling Act of 1833,<sup>47</sup> which consolidated various enactments going back to the early eighteenth century. The provision is retained, but in watered-down language—“may be fired upon”—in current United Kingdom legislation.<sup>48</sup>

All three enactments are open to serious objection as being contrary to contemporary international law. The Australian legislation is even worse, as it also permits the same procedure to be applied to offending aircraft.<sup>49</sup>

The case of the *M/V Saiga*, before the International Tribunal for the Law of the Sea, reveals that some other States extend quite draconian domestic legislation, normally applicable to land territory, against foreign vessels at sea. In that case, a vessel registered in Saint Vincent and the Grenadines was arrested in the exclusive economic zone of Guinea for alleged customs offenses. Force was used, and two members of the crew of the arrested vessel were wounded. The Penal Code of Guinea was cited in argument; it provides that “no crime or offense is committed in the case of a killing or wounding committed by the forces of order against offenders who as a flagrant offense



smuggle at the border and have not complied with the usual demands.”<sup>50</sup> It was not necessary for the Tribunal, in the circumstances of the case, to judge the compatibility of this provision with international law.

### **The Enforcement of Domestic Laws in National Maritime Zones Against Citizens and Flag Vessels by Navies of the Enforcing State**

Navies are often used in law enforcement roles in national maritime zones. In the case of States which do not have a separate coast guard, fisheries protection, or other similar non-naval service, it may be the only enforcement agency, or at least enforcement platform, available.<sup>51</sup> The advantage of using navies is great when States with large maritime areas to protect are faced with incursions by technologically advanced and fast, distant-water fishing fleets.<sup>52</sup> There is also an economy of scale and effort, where navies on training exercises may be diverted to law enforcement activities as required.

The disadvantages of using navies in a law enforcement role are chiefly two. Most obviously, navies are not primarily intended for law enforcement but for national defense. Undue diversion from their primary role is seen as undesirable. Second, the powers of naval officers to arrest persons are, at least in the case of the common-law countries, no greater than those of an ordinary citizen. Any additional powers required must be granted by statute. In this connection, there is the additional consideration, again at least in the case of the common-law countries, of the traditional reluctance to use the armed forces in the enforcement of laws against citizens.

In the United States, the Posse Comitatus Act forbids the use of the U.S. Army or Air Force to enforce domestic laws. This prohibition is extended, as a matter of policy, to the Navy and the Marine Corps.<sup>53</sup> The United States Coast Guard exists for the enforcement of laws against both citizens and aliens. Statutory exceptions to the prohibition of the use of the Navy are allowed, and they have been made in the case of the counterdrug war.<sup>54</sup> However, the Navy provides only the platform and the equipment; search, seizure, and arrest are carried out by Coast Guard personnel embarked. The prohibition is not as strict in Australia<sup>55</sup> or Canada.<sup>56</sup> Although naval officers have been invested with statutory powers of arrest under various statutes concerned with the enforcement of laws at sea, there is a reluctance to use these unless necessary, especially against citizens.<sup>57</sup> Normally civilian officials holding powers under such legislation as that governing customs and fisheries are carried aboard.

## Into the Next Millenium

The modern international law of the sea is as unavoidable a feature of the arena in which armed conflict may be threatened, or actually conducted, as the limitations of the weapons platforms deployed and the state of the weather. Certain additional rights and duties arise under the law of armed conflict not applicable under the law of the sea in times of peace; but a knowledge of the law of the sea, and its inculcation in regular exercises, is an essential part of naval and air force training.

The enforcement of national laws at sea, in exercise of the rights to regulate the extensive maritime zones recognized by the LOS Convention and under customary international law, necessarily involves a projection of sovereignty or of national jurisdiction with a high potential to conflict with the rights and interests of other States. Disputes may arise concerning innocent passage through the territorial sea, straits transit, and archipelagic sea lanes passage and overflight, and the enforcement in the EEZ of laws not clearly warranted by the 1982 Convention or by international rules and standards laid down by competent international organizations or under international conventions adopted by diplomatic conferences consistent with the Convention. Disputed claims to sovereign rights or jurisdiction may lead to confrontation and the danger of eventual armed conflict. The international law of the sea will be invoked by one or both sides in justification of its position. The national law enforcement agencies, whether navies, coast guards, or other forces, acting in accordance with national laws and policies that may or may not be in accordance with international law, are the instruments by which that law may be violated or vindicated. The potential for mistakes or miscalculations can hardly be overstated.

The principle of graduated force<sup>58</sup> underlies the measures that should be employed in order to achieve a de-escalation of the threat of violence and the peaceful resolution of disputes. It is vital that all maritime law enforcement agencies understand this principle and do not engage in actions that are needlessly provocative or escalatory. There is consequently a need for close coordination of all agencies, with joint training in common doctrine, and the observance of integrated rules of engagement in maritime law enforcement roles. Since navies, whether they are directly involved in law enforcement or not, have the ultimate responsibility of defending the nation against armed attack, it is logical that they should assume the primary responsibility for the development of doctrine and the coordination of enforcement procedures.



It is evident that some States engage in more forceful measures in the purported exercise of their sovereignty, sovereign rights, or jurisdiction than is justified by international law. A developed international jurisprudence has not yet emerged. The reluctance of States to accept the compulsory jurisdiction of international courts and tribunals over questions of the manner of their exercise of enforcement powers has been noted. The obligation to submit disputes to settlement procedures under the LOS Convention, albeit affected by limitations and exceptions, has only existed for the parties to the Convention since its entry into force in 1994. The potential for those courts and tribunals to develop principles and rules in relation to maritime law enforcement may be realized in the early part of the twenty-first century.

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Notes

1. On law and the theory of graduated force, see O'CONNELL, *THE INFLUENCE OF LAW ON SEAPOWERS* 53–69 (1975).
2. These provisions are implemented in domestic law, e.g. Admiralty Act, 1988, sec. 22(4) (Austl.).
3. Since there is no corresponding right of “innocent overflight” of the territorial sea, the question of law enforcement against aircraft can only arise in international straits where aircraft enjoy the right of transit overflight. United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 38(1), U.N. Doc. A/conf.62/122 [hereinafter LOS Convention].
4. CHURCHILL & LOWE, *THE LAW OF THE SEA* 92 (rev. ed. 1988).
5. E.g., Environment Protection (Sea Dumping) Act, 1981 (Austl.), and the Protection of the Sea (Prevention of Pollution from Ships) Act, 1983 (Austl.) do not appear to restrict enforcement in the territorial sea against a vessel engaged in straits transit passage.
6. CHURCHILL & LOWE, *supra* note 84.
7. For differing views, see KWIATOWSKA & AGOES, *ARCHIPELAGIC STATE REGIME IN THE LIGHT OF THE 1982 UNCLOS AND STATE PRACTICE* (Indonesian Centre for the Law of the Sea, 1991) and Bernhardt, *The Right of Archipelagic Sea Lanes Passage: A Primer*, 35 VA. J. INT'L L. 719 (1995).
8. Fitzmaurice, *The Territorial Sea and Contiguous Zone*, 8 INT'L & COMP. L. J. 73, 111 (1955).
9. 2 O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 1057–1061 (Shearer ed., 1984).
10. Naim Molvan, *Owner of the M/V Asya v. Attorney-General for Palestine* [1948] A.C. 351, discussed by Fawcett in 42 BRIT. Y.B. INT'L L. 229 (1967).
11. By way of analogy to the British “Hovering” Acts of the 18th century and similar United States and European legislation of the 18th and 19th centuries. O'CONNELL, *supra* note 9, 1035–1043, 1060.
12. LOS Convention, *supra* note 3, art. 68. Sedentary species are those creatures, such as clams and crabs, that are in constant contact with the seabed at their harvestable stage. *Id.*, art. 77(4).
13. *Id.*, arts. 56(3), 77(2).
14. *Id.*, art. 55, speaks of the EEZ as a “specific legal regime” established by, and subject to the provisions of, the Convention. It is thus both *sui generis* and *sui juris*.

15. The International Tribunal for the Law of the Sea heard its first case concerning the release of an arrested vessel in November 1997. The *M/V Saiga* (Saint Vincent and the Grenadines v. Guinea), Judgment of December 4, 1997. Text on Internet: [http://www.un.org/Depts/los/judg\\_1.htm](http://www.un.org/Depts/los/judg_1.htm).

16. LOS Convention, *supra* note 3, art. 92.

17. *Id.*, art. 91.

18. For example, the United States has formal agreements with a number of countries permitting the stopping, boarding and search of vessels under their flags on the high seas suspected of carrying illicit narcotics. It also has an agreement with Haiti regarding vessels engaged in unlawful immigration. For European practice implementing the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (28 I.L.M. 497), Article 17 of which provides for international cooperation in the interdiction of drugs at sea, see Gilmore, *Narcotics Interdiction at Sea: The 1995 Council of Europe Agreement* 20 MARINE POL'Y 3 (1996).

19. LOS Convention, *supra* note 3, art. 110(3).

20. *Id.*, art. 111.

21. The *I'm Alone* (Can. v. U.S.) (1935), 3 UNITED NATIONS REPORTS OF INTERNATIONAL ARBITRAL AWARDS 1609 (1951). See the discussion of this case by Fitzmaurice, *The Case of the I'm Alone*, 17 BRIT. Y.B. INT'L L. 82, 99–100 (1936). See also the discussion of the requirement that hot pursuit begin immediately after detection of the offending vessel, by the International Tribunal for the Law of the Sea, *Saiga* Case, *supra* note 15, para. 61.

22. The Great Barrier Reef Marine Park Act, 1975, sec. 48A (Austl.); the Fisheries Management Act, 1991, sec. 87 (Austl.).

23. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, 11 I.L.M. 1291 (1972). See also the Oslo Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, 11 I.L.M. 262 (1972), which applies to the North Sea and the North East Atlantic.

24. For reasonably close adaptations of these articles, see the Protection of the Sea (Prevention of Pollution from Ships) Act, 1983 (Austl.); the Environment Protection (Sea Dumping) Act, 1981 (Austl.).

25. For some examples of State practice, including Latin-American practice, see Fenrick, *The Use of Force by Canadian Warships*, 18 CAN. Y.B. INT'L L. 113, 135–142; 2 O'CONNELL, *supra* note 9, at 1071–1072.

26. *Supra*, note 21.

27. Fitzmaurice, *supra* note 21, suggests that the fact that the attempted apprehension took place in a special customs zone outside territorial waters was a relevant factor, since a greater degree of force is often considered permissible in territorial waters. It is submitted, with respect, that this view is erroneous. Cf. Customs and Excise Management Act., ch. 2, sec. 91(2) (1979) (U.K.), which permits “firing upon” foreign ships in the territorial sea, after a warning shot, in the enforcement of the Act. This is a watering down of the earlier Smuggling Acts which permitted “firing at or into” delinquent vessels. See below.

28. 35 I.L.R. 485 (1962).

29. Fenrick, *supra* note 25, at 133, regards the Red Crusader decision as setting “unduly stringent limitations on the legitimate use of force.” While this is arguable, he does not take into account the regulatory nature of the offense.

30. The United States protested against the immediate resort to warning shots by the Soviet Navy in the case of an American cargo vessel which had left a Soviet port without exit clearance.



The *Sister Katingo* Incident, Rousseau (ed.), *Chronique des faits internationaux*, 68 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 938 (1964).

31. The use of force by Australian naval vessels charged with law enforcement duties is notably restrained. Rules of engagement require that special authorization be given for the use of deadly force, except in self-defense. Since these rules are not public documents, it is impossible to offer criticism, either that they are too restrictive or too liberal in their allowance of the use of force. Nevertheless, it is clear that the rules should be constantly appraised and, if necessary, revised in the light of experience.

32. 23 I.L.M. 705 (1984). The Protocol requires 102 acceptances to enter into force. Russia and some 70 other States have so far deposited their acceptances.

33. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 220–221 (4th ed. 1991) citing the statement of the UK delegate. Whether Article 3 *bis* is stricter than existing custom is doubtful. Harris cites Hughes, *Aerial Intrusions by Civil Airliners and the Use of Force*, 45 J. AIR L. & COMM. 595, 619–620 (1980) for the view that custom allows the use of force as a last resort in response to a proportionate national security interest, and that this is wider than Article 3 *bis* allows. However, provided that self-defense is regarded as including the right of anticipatory or interceptive self-defense, this would not appear to be so. For the distinction between anticipatory and interceptive self-defense, see DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 190 (2nd ed. 1994).

34. LOS Convention, *supra* note 3, art. 287(1).

35. See generally ADEDE, THE SYSTEM FOR SETTLEMENT OF DISPUTES UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A DRAFTING HISTORY AND A COMMENTARY (1987); V UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982—A COMMENTARY ON SETTLEMENT OF DISPUTES (Rosenne & Sohn eds., 1989).

36. LOS Convention, *supra* note 3, art. 298(1)(b).

37. *Id.*, art. 297(1).

38. Treves, *The Law of the Sea Tribunal: Its Status and Scope of Jurisdiction*, 55 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 421, 434 (1995). Treves states that the point can be argued either way and is not resolved by the *travaux préparatoires*. He rather discounts the importance of the possible holding that there is complete compulsory jurisdiction in relation to disputes arising in the territorial sea or archipelagic waters since “the cases in which the Convention regulates the sovereignty of the coastal state are very rare.” However, he does not advert to straits transit passage and archipelagic sea lanes passage nor to law enforcement generally in relation to these waters.

39. Sea Fisheries Act, ch. 77, sec. 10 (1968) (U.K.), provides that a British Sea Fishery Officer is not liable in civil or criminal proceedings provided he or she acts in good faith and with reasonable cause. See also the Customs Act, R.S.C. 1970, c. C-40, section 141(6) (Can.).

40. *Buron v. Denman*, (1848), 2 Ex. 167. The plea is not available against a British subject: *Walker v. Baird*, (1892), AC 491; *Nissan v. Attorney-General*, (1970) A.C. 179.

41. O’CONNELL, *supra* note 9, at 900 states that “there seems to be no doubt that any injury occurring on a foreign ship in British territorial or internal waters is governed by English law as the *lex loci delicti*,” but cites no authority from case law. He argues that “there seems to be no logical basis in English law for distinguishing between foreign ships in ports and in the territorial sea.”

42. *Supra* note 39.

43. Quoted with approval in 1 RUSSELL ON CRIME 432 (Turner ed., 12th ed. 1964).

44. REVISED STATUTES OF CANADA, R.S.C., ch. C-46 (1985); Fenrick, *supra* note 25, at 119.

45. Sec. 2, "peace officer," (f) (ii); Fenrick, *supra* note 25, at 120–121.
46. Fenrick, *supra* note 25, at 123.
47. British Smuggling Act, 1833, 3 & 4 Wm. IV, ch.53, sec. 8 (Eng.).
48. The Customs and Excise Management Act, 1985, ch.2, sec. 91(2) (U.K.). The section, however, applies now only to foreign vessels in the territorial sea of the United Kingdom. Sec. 88.
49. Customs Act, 1901, § 184(2) (Austl.).
50. Unofficial translation of the Penal Code of Guinea, Article 363, cited by Judge Anderson in his dissenting opinion, para. 6: "Il n'y a ni crime, ni delit en cas d'homicide ou de blessures commises par les forces de l'ordre sur les personnes delinquants qui en flagrant délit se fraudent à la frontière et qui n'ont pas obtempéré aux sommations d'usage." (The present writer has corrected several obvious infelicities in the translation supplied to the Tribunal by the applicants, but these have no bearing on the point under discussion.)
51. M. O'Connor, citing THE MILITARY BALANCE 1996/97 (International Institute of Strategic Studies, London, 1996), lists thirty-eight States maintaining a coast guard service, and twelve more with a coast guard contained within the navy. O'Connor, *A Coastguard for Australia?* in POLICING AUSTRALIA'S OFFSHORE ZONES 268–278 (Wollongong Papers on Maritime Policy No. 9, MacKinnon & Sherwood ed., 1997).
52. E.R. Fidell, *Fisheries Legislation: Naval Enforcement* 7 J. MAR. L. & COMM. 351–366 (1976).
53. *Id.*, at 363. The Posse Comitatus Act was originally enacted in 1878. 18 U.S.C. 1385.
54. Grunawalt, *United States Navy/Coast Guard Cooperation in the War on Drugs at Sea*, in MacKinnon & Sherwood, *supra* note 51, at 4.
55. Smith, *The Use of Armed Forces in Law Enforcement*, in MacKinnon & Sherwood, *supra* note 51, at 74, 88.
56. Fenrick, *supra* note 25.
57. The Australian High Court rejected a challenge to the constitutionality of using naval officers in the enforcement of fisheries laws. *Li Chia Hsing v. Rankin*, 141 C.L.R. 182 (1978).
58. O'CONNELL, *supra* note 1, at 53–69.





# XVIII

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## The Law of Economic Sanctions

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Paul Szasz

OVER THE YEARS, THE EXERCISE OF MILITARY FORCE to accomplish national or international objectives has become ever less acceptable and, in many instances, legally or politically objectionable. Consequently, the alternative of relying on economic sanctions has become more attractive. Indeed, the current decade has seen more instances of internationally organized economic boycotts than has probably all of recorded history, while at the same time individual national exercises of systematic economic pressures have also increased.

As a result, there are by now sufficient instances in which economic sanctions have been, and in some instances are still being, implemented that some tentative conclusions concerning their effectiveness can be drawn and the many legal problems that have, sometimes unexpectedly, arisen can be examined. This study will concentrate on the latter, while questions concerning effectiveness will be considered only in the context of whether a low degree of effectiveness may be relevant to the legality of particular measures and of legal and administrative steps that might be taken to increase effectiveness.

“Economic sanctions” will be dealt with in a broad sense—that is, all means of exercising pressures short of the threat or use of military force directly against a target State or entity. Thus, aside from strictly economic measures,



pressures exercised through breaking or reducing diplomatic, cultural, or communication ties will be considered.

The purpose of the pressures to be considered here must be to induce compliance with some international obligation that the target State has failed to observe. Collective sanctions for essentially punitive purposes have no accepted place in international law, and the question of the legality of individual national reprisal, retorsion, or retaliation will not be considered here. Nor will this study address the question of the legality of applying economic pressure as part of diplomatic bargaining. The pressures that will be examined range from a mere refusal to trade or to maintain certain economic, cultural, or diplomatic relations, to pressures on others to do likewise (secondary boycotts), as well as the use of force to prevent trading between the target State and third parties.

### The Right to Impose Economic Sanctions

**Rights of Individual States.** Article 2(4) of the United Nations Charter prohibits all UN members from resorting to the threat or use of force against the territorial integrity or political independence of any State (i.e., UN member or not). Though the point was not explicitly stated, the word "force" in this context was at least initially generally understood to refer only to military force.<sup>1</sup> It is, however, necessary to examine whether this restricted meaning still prevails or whether some additional grounds have been developed for proscribing the exercise of other types of pressures by UN members against the political independence of any State.

Over the years, various international organs, and particularly the UN General Assembly, have adopted a series of solemn resolutions that, *inter alia*, are designed to delegitimize the use of economic force by individual States. One of the first of these was the 1965 "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty," which declared that

No State may use or encourage the use of economic, political or other types or measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind.<sup>2</sup>

Precisely the same text was repeated in the 1970 "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations,"<sup>3</sup> which is widely accepted as an authoritative interpretation of the UN Charter. A similar

text appears in the 1980 “Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States.”<sup>4</sup>

In 1995 the General Assembly adopted a resolution on “Economic Measures as a Means of Political and Economic Coercion against Developing Countries.”<sup>5</sup> In it the Assembly expressed grave concern “that the use of coercive economic measures adversely affects the economy and development efforts of developing countries and has a general negative impact on international economic cooperation” and urged

the international community to adopt urgent and effective measures to eliminate the use by some developed countries of unilateral coercive measures against developing countries which are not authorized by relevant organs of the United Nations or are inconsistent with the principles contained in the Charter of the United Nations, as a means of forcibly imposing the will of one State on another.

In 1996 the General Assembly adopted a further resolution to similar effect, under the title “Elimination of Coercive Economic Measures as a Means of Political and Economic Compulsion.”<sup>6</sup> In 1997 it adopted by near unanimity a resolution on “Unilateral Economic Measures as a Means of Political and Economic Coercion Against Developing Countries”—in which it largely repeated the 1995 language but added contravention of “the basic principles of the multilateral trading system” as an additional ground for eliminating “the use of unilateral coercive economic measures against developing countries”—as well as an even stronger though more limited resolution on “Human Rights and Unilateral Coercive Measures.”<sup>7</sup>

Consequent on the 1995 resolution, the UN Secretariat in the summer of 1997 convened an *ad hoc* expert group meeting on “economic measures as a means of political and economic coercion against developing countries.”<sup>8</sup> That group concluded, under the heading of “basic legal norms,” that

the basic principles of international law . . . as set out in the Charter of the United Nations, elaborated in a number of international legal instruments and backed by declarations adopted by international conferences, proscribe . . . the imposition of coercive economic measures as instruments of intervention in matters that are essentially within the domestic jurisdiction of any State.<sup>9</sup>

The allowable exceptions the group recognized from this general prohibition include: multilateral economic sanctions mandated by the Security Council (to which most of the balance of this study is devoted); other situations where the Security Council has determined the existence of a threat to the peace, breach



of the peace, or act of aggression; where the Security Council has merely recommended economic sanctions, provided that any limits specified by the Council are observed; where the General Assembly recommends sanctions by consensus or by large majorities over a period of time; certain instances where regional organizations impose economic sanctions for cause against their own members; where one or more States adopt unilateral measures in response to a clear violation of universally accepted norms, standards, or obligations, provided these States are not seeking advantages for themselves but are pursuing an international community interest; and where the economic measures constitute proportional countermeasures by a State for a prior injury, provided *inter alia* that the measures are not designed to endanger the territorial integrity or political independence of the target State.<sup>10</sup>

In this connection it should be noted that the international community, as represented by the UN General Assembly, has in the past several years and by increasing majorities (in 1997, by 143 in favor and three against) adopted ever-stronger resolutions of condemnation of the economic sanctions imposed by the United States against Cuba.<sup>11</sup>

It may thus be concluded that, as the twentieth century reaches its close, at least *de lege ferenda* no State may any longer claim a general legal right to impose economic sanctions against other States, except perhaps in situations where the coercion is exercised in the interest of the international community and the latter supports or at least does not strongly oppose the measures in question.

**Role of International Organizations.** Generally speaking, intergovernmental organization (IGOs) cannot take any steps vis-à-vis third parties that would not be within the authority of their members. However, if an organization exercises coercive measures against one of its members and in accordance with its constitution, then it may be said that that State has consented to such exercise by becoming a member of the organization and a party to its constituent treaty.

Even so, if the IGO in question is a "regional arrangement or agency" within the meaning of Chapter VIII of the UN Charter, then it may be bound by the requirement in Charter Article 53(1) that any enforcement action taken by a regional IGO requires the authorization of the Security Council. It should, however, be noted that in actual practice such IGOs (including the Organization of American States (OAS) and various regional African organizations, such as The Economic Council of West African States (ECOWAS)), have sometimes failed to secure such authorization, at least in advance, and the Council has not actually condemned them for that.

Aside from regional organizations, there are other IGOs whose charters allow them to impose economic penalties on members under certain circumstances. These IGOs include the International Atomic Energy Agency, which is authorized to impose certain nuclear sanctions on States that violate its safeguards—though for serious penalties it must turn to the Security Council.<sup>12</sup> Other treaties, such as the Montreal Ozone Protocol<sup>13</sup> and the Chemical Weapons Convention,<sup>14</sup> do establish IGOs, but the restrictions they impose that prohibit members from trading with non-cooperating nonmembers or with members in violation of certain treaty provisions, in materials covered by the respective treaties, do not generally involve these IGOs in sanctions decisions; rather these provisions are designed not so much to be coercive or punitive but to allow the undisturbed functioning of the regimes established by the treaties without giving an undue advantage to States not participating in them. They will not be explored further here.

### **The Obligation to Participate in International Economic Sanctions**

In contrast to the general prohibition against States imposing unilateral economic sanctions against other States, when economic sanctions are decreed by the UN Security Council pursuant to Article 41 of Chapter VII of the UN Charter, all members (except any that might be exempted pursuant to Charter Article 48(1)) of the Organization are required to participate in such collective measures. This obligation flows from Articles 2(5), 25, and 48(1) of the UN Charter, by which all members are bound. As for nonmembers, Article 2(6) foresees that these too shall be required to cooperate, and in practice the few nonmembers (notably Switzerland) have done so voluntarily. While other IGOs cannot be commanded directly by the United Nations (though at least the “specialized agencies” and certain others have undertaken through relationship agreements to give serious consideration to UN recommendations), their members are required by Charter Article 48(2) to ensure their cooperation. Finally, private persons (natural or juridical), as well as NGOs (which are established and operate under some nation’s law), must be required by their respective countries to conform to sanctions imposed by the Security Council.

It should be noted that the Charter generally allows no exception or excuse for noncooperation with sanctions—except that the Security Council can (though it only most exceptionally does<sup>15</sup>) in effect exempt one or more member States under Article 48(1). However, unless the Council does so, a State cannot raise the argument that compliance with a particular measure



ordered by the Council would violate a prior treaty or contractual obligation—for under Charter Article 103 a member's obligations under the Charter must prevail over those under any other international agreement.<sup>16</sup> Although Article 50 of the Charter recognizes that States may, as a result of carrying out sanctions measures ordered by the Security Council, find themselves confronted with special economic problems, such problems do not permit these States to exempt themselves from compliance but only afford them the right to consult with the Council regarding a solution to these problems.<sup>17</sup>

Finally, the question could be raised—though so far this has never formally been done—of whether a UN member could refuse to participate in the imposition of sanctions on the ground that these violated some higher norm, such as binding provisions of humanitarian law (a question that has been raised with respect to Iraq and will be examined below) or perhaps the “inherent right of self-defence” referred to in Charter Article 51 (a question that was raised with respect to Bosnia). It should be noted that there is no provision for definitively settling a dispute between the Organization or one of its organs and a member State. From the UN's point of view, it would necessarily have to insist that determinations of the Security Council are binding and that members have obligated themselves to comply with them. The Council or the General Assembly could request an advisory opinion of the International Court of Justice, either on that issue of principle or on the legitimacy of a particular Security Council action, but the Court's opinion would not be binding unless the State(s) concerned had agreed to accept it as such.

### **The Imposition of Mandatory Economic Sanctions<sup>18</sup>**

The authority of the UN Security Council to impose mandatory economic sanctions constitutes part of a regime for the maintenance of international peace and security, set out in some detail in the Charter, which in turn is based on a considerably less detailed provision of the Covenant of the League of Nations. Article 16(1) of that instrument provided that if any League member resorted to war against another member, all other members were immediately and automatically to subject the former to a severance of all trade and financial relations, prohibit all intercourse with its nationals and prevent all financial, commercial, or personal intercourse between them and the nationals of the offending State.<sup>19</sup>

**Formal Requirements.** Under the UN Charter, the imposition of economic sanctions is by no means automatic, but is part of a graduated scheme set out in Chapter VII that remains at all times under the control of the Security Council. The first step must be a determination by the Security Council under Article 39 of "the existence of any threat to the peace, breach of the peace, or act of aggression."<sup>20</sup> Although in many instances (e.g., Iraq's invasion of Kuwait) the validity of such a determination is not in doubt, in others (such as the disintegration of the Somali government) the determination appears to have been made solely for the, arguably laudable, purpose of allowing humanitarian intervention in a country needing such assistance but not having any government in a position to request it.<sup>21</sup> On the other hand, the determination by the Council that the refusal of Libya to extradite two of its citizens to Scotland or the United States for trial in the Lockerbie case constituted a threat to or breach of the peace<sup>22</sup> appears to have been merely a device to enable three permanent members of the Council to reinforce their political demands by the imposition of worldwide economic sanctions.<sup>23</sup> Such determinations have raised the cry, in both academic and in some diplomatic circles, that the Council is exceeding its authority and that there appears to be no mechanism for preventing actual or possible abuses thereof.

Having made a determination under Article 39, the Council may at the same time, pursuant to that article and Article 40, "call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable." If it does so, the Council is to take account of any failure to comply with such recommended measures.

Whether or not any provisional measures have been called for or complied with, the Council may, under Article 41, decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call on UN members to apply such measures. Unless otherwise clearly specified (e.g., that the Council is merely making a recommendation or that it is not addressing itself to all members), such a call is binding on all members. These measures "may include complete or partial interruption of economic relations and of rail, sea, air, postal telegraphic, radio, and other means of communication, and the severance of diplomatic relations." As will be pointed out below, the Council can adjust these measures from time to time. It can also impose certain measures not explicitly listed in the Charter catalogue.

Should the Council consider that measures short of force are likely to be inadequate or have proven to be so, the Council may under Article 42 move to take military actions. These will not be examined in this study and are



mentioned here only to illustrate that economic sanctions do not stand alone but are part of a panoply of measures that the Council can deploy when faced with threats to or breaches of the peace, or with acts of aggression. It should be noted that the Council has considerable flexibility in doing so and is not bound (except for making the initial determination under Article 39) as to the sequence of the measures it may take. Nor is it required to restrict itself to one or the other at a time; however, before moving to military measures, it must make a determination that economic ones are not adequate to accomplish their purpose.

In connection with the imposition of economic (or for that matter, military) sanctions, the Charter does not require that the Council give a formal warning to the target State. However, the General Assembly has recently recommended to the Council that a warning in unequivocal language should be given.<sup>24</sup>

All decisions of the Council under Chapter VII—indeed all its substantive decisions—require the affirmative vote of at least nine (of the fifteen) members of the Council, “including the concurring votes of the [five] permanent members.” In spite of this apparently clear language, the Council has since its very first year determined that only a negative vote by a permanent member constitutes a veto—that an abstention does not.<sup>25</sup> Thus, in theory, a decision of the Council could be taken by just nine of the non-permanent members, with all the permanent members abstaining. In practice decisions under Chapter VII are normally taken by near unanimity, especially of the permanent members. The same is true of all decisions that change a sanctions regime, whether to make it stiffer or easier, or to suspend or terminate it. The consequences of this custom are explored below.

***The Practice of the Security Council.*** The Security Council has imposed mandatory economic sanctions infrequently. Each instance differs in at least some interesting aspects from the others. They are, in the order of the date of initial imposition, as follows:

- *Southern Rhodesia*: 1965 arms and oil embargo and a break in economic relations—terminated in 1979 on reaching the agreement, under the auspices of the British government, that established Zimbabwe.<sup>26</sup>
- *South Africa*: 1977 arms embargo—terminated in 1994 on assumption of power by the new government.<sup>27</sup>
- *Iraq*, in connection with the invasion of Kuwait: 1990 comprehensive economic embargo on exports and imports, especially on export of oil—still in force subject to certain exemptions.<sup>28</sup>

- *Yugoslavia*: (1) 1991 general and complete arms embargo on the Socialist Federal Republic of Yugoslavia (SFRY), continued after its dissolution in respect of all the successor States—phased termination started in November 1995; (2) 1992 complete economic embargo (including flights, sporting and cultural events) on the Federal Republic of Yugoslavia (FRY) and later also and especially on the Republika Srpska (the so-called Serb State in Bosnia and Herzegovina)—first hardened and later eased, suspended from time to time and then finally terminated in 1996.<sup>29</sup>
- *Somalia*: 1992 embargo on all arms deliveries.<sup>30</sup>
- *Libya*, in connection with the investigation of two airplane bombing incidents: 1992 arms and air embargo, reduction of diplomatic missions, later freezing of funds and embargo on importation of oil equipment.<sup>31</sup>
- *Liberia*: 1992 arms embargo.<sup>32</sup>
- *Haiti*: 1993 oil and arms embargo, suspended and reinstated several times, and terminated in 1994 on return of the Aristide government.<sup>33</sup>
- *Angola*: 1993 arms and petroleum embargo against UNITA (anti-government faction) and 1997 travel restrictions on high UNITA officials;<sup>34</sup>
- *Rwanda*: 1994 arms embargo—partially suspended in 1995 and terminated in respect of the government in 1996, but continued against anti-government forces;<sup>35</sup>
- *Sudan*: 1996 diplomatic sanctions and later an air embargo;<sup>36</sup> and
- *Sierra Leone*: 1997 arms and petroleum embargo and ban on travel by senior personnel of the coup-installed government, terminated in 1998 on the return of the elected President.<sup>37</sup>

On the basis of these instances, a number of relevant practices of the Security Council can be discerned. But first, a more general observation may be in order. Except for two minor instances, almost all economic sanctions were imposed in the first half of the 1990s. These were the years in which, as a result of the sudden disintegration of the Soviet Union and great political weakness in China, the Cold War suddenly ended, leaving the international diplomatic field at least temporarily to the Western allies and in particular to the United States. At the same time the United Nations, freed of the former political constraints and buoyed by the successful Namibia operation in 1989-1990, put into the field an entirely unprecedented number of peacekeeping operations—some of which were also supported by sanctions regimes. As it turned out, neither the infrastructure of the UN Secretariat nor that of the Security Council was really up to this tremendous expansion of business.<sup>38</sup> Thus peacekeeping operations were launched and economic



sanctions imposed without any significant studies of their objectives, means for accomplishing them, collateral harms that might result, or exit strategies. By the mid-1990s these faults were becoming evident. Even though the Council itself seemed reluctant to change its ways (in part because it was constantly busy with day-to-day decision-making), other UN organs, particularly the General Assembly, have confronted the Council on some of these issues and demanded reforms. These proposals too are reflected in the analysis below.

***Decision-making by the Security Council.*** Decisions concerning sanctions—as is true of most decisions during the past decade—are taken by the Security Council in private consultation with all Council members, in most instances probably preceded by unofficial meetings among some or all of the permanent members. Only after a decision has been reached to accept the text of a particular draft resolution (whether the decision takes hours or weeks of negotiations) is a public meeting held at which the President (who rotates each month) announces that agreement has been achieved on a text, which is then distributed in public. A formal vote of the Council is then taken. After that vote, some or all of the members may make explanatory statements. At the same meeting, before or after the vote, nonmembers of the Council (in particular the States especially concerned) are invited to make statements. They evidently have no influence on the vote, because the decision on the draft resolution has already been taken: very rarely is a resolution brought to a public meeting and vote that is not assured of adoption, because of either insufficient votes or a veto by one or more permanent members. Council decisions of lesser import are increasingly taken in the form of presidential statements. Also negotiated in private consultations, these are issued only when a consensus<sup>39</sup> formulation can be agreed on; however, decisions imposing, changing, suspending, or terminating sanctions are invariably taken in the form of formal resolutions.

This Council procedure has come under growing criticism by member States without a seat on the Council, and complaints are often heard in the General Assembly, especially in its Special Committee on the Charter of the United Nations and on Strengthening the Work of the Organization. Though the Council President of the month now regularly holds briefings after every private consultations meeting, calls for increasing transparency and more effective participation by nonmembers of the Council continue.<sup>40</sup>

***Suspension and Termination of Sanctions.*** The precise conditions relating to each sanctions regime are spelled out in the relevant Security Council

resolutions, which may be amended from time to time to improve clarity, add or remove conditions, or provide for *ad hoc* or long-term suspensions or ultimately for termination. One point that has come under increasing criticism by target States and the General Assembly itself is that although sanctions are imposed in connection with some target State noncompliance with demands made by the Council, the conditions for termination of the sanctions are by no means always clear. In particular, in complex situations, in which sometimes dozens of Security Council resolutions and an equal number of formal presidential statements are made over a period of years (e.g., in respect of Iraq and the Gulf War, or in respect of the Former Yugoslavia), with an equal or greater number of reactions by the target States, the direct connection (if one ever existed) between particular Council demands, State reactions, and sanctions measures may be obscured or lost. In such cases the members of the Council, and in particular the permanent ones, may disagree as to whether and when the target State has met the conditions for the easing, suspending, or terminating of sanctions.

In this connection it should be noted that sanctions resolutions have, with very few exceptions, been adopted without any built-in time limits (i.e., “sunset” provisions). This contrasts sharply with the practice that has evolved in respect of peacekeeping operations, whether of the “Chapter VI and a half”<sup>41</sup> or the Chapter VII variety. These have, since the collapse of the First United Nations Emergency Force (UNEF I), always been approved for only relatively short periods: normally six months, in a few instances shorter, rarely longer. At the end of any such specified period the force is discontinued automatically unless agreement can be reached on an extension; a resolution that so provides is, of course, subject to veto by any permanent member.

With respect to several of the long-term sanctions regimes, in particular those still covering Iraq and Libya, and formerly the ones relating to Yugoslavia, it appears clear that if a resolution to extend them without significant change had to be put to the Council, it would fail—sometimes because objective conditions have significantly changed, and sometimes because of altered political perceptions and alignments of the Council’s permanent members. However, because sanctions regimes have no sunset provisions, those who wish to terminate or modify them bear the burden of convincing all permanent members not to veto such a change. It seems likely that in the future the Council will not adopt significant sanctions regimes without sunset provisions, because certain permanent members, and perhaps some nonpermanent ones, will not consent to approving new open-ended control regimes.



One factor that may contribute to such a change is the gradual recognition of the reality that in spite of the Charter obligations of all UN members to comply with Security Council-ordered sanctions, when a particular control regime gradually loses its legitimacy (either because many States consider that the target State has complied sufficiently with reasonable demands of the Council, or because the burden caused by the sanctions on either the target or on other States [discussed below] is considered excessive), the necessary cooperation of States diminishes and gradually disappears. As a particular sanctions regime thus visibly crumbles, even its most ardent supporters may see the advantage of negotiating a formal termination rather than tolerating, perforce, the informal disappearance of the regime, with the bad example that may set for continuing respect for other, more important ones.

In 1997 the General Assembly adopted a resolution,<sup>42</sup> following extensive consideration especially in the Informal Open-Ended Working Group on the Agenda for Peace, reflecting a number of major and minor dissatisfactions with the practices of the Security Council regarding the imposition of economic sanctions. In that resolution, which is not binding on the Council,<sup>43</sup> the Assembly *inter alia* recommended that “[t]he Council should define the time-frame for sanctions regimes taking [specified] considerations into account” and that the “steps required from the target country for the sanctions to be lifted should be precisely defined” by the Council.<sup>44</sup>

At present, with respect to the open-ended regimes, the burden is effectively on those wishing to terminate them to offer proposals acceptable to the permanent members that wish to maintain them. Sometimes decisions have been taken to suspend these regimes, either for short, renewable terms (which permits the proponents of a particular regime to veto each further extension of the suspension)<sup>45</sup> or indefinitely, in contemplation of an eventual termination but still allowing automatic reinstatement if a negative report is received from a designated official.<sup>46</sup>

**Formal Targets of Sanctions.** Normally, States are the targets of economic sanctions imposed by the Security Council. There are exceptions. For example, in imposing sanctions in respect of Angola, the Council targeted not the country as a whole but only the UNITA rebels that continued to fight the government in spite of several negotiated and agreed cease-fires.<sup>47</sup> Starting in September 1994, the Security Council imposed special sanctions in respect of the Republika Srpska,<sup>48</sup> the unrecognized Serb State established within Bosnia and Herzegovina.

In other instances, the Security Council, having concluded that undifferentiated sanctions may only injure the powerless masses (see below), has targeted especially governmental elites whose behavior caused the international offense for which sanctions were imposed and who may be in a position to bring the country into compliance. For example, in employing economic sanctions to neutralize a military coup against the elected government of Sierra Leone, the Council, *inter alia*, ordered all States to prevent the entry into or the transit through their territories of “members of the military junta and adult members of their families.”<sup>49</sup>

**Enforcement of Sanctions.** Although all UN members are required to comply with economic sanctions imposed by the Security Council, the enthusiasm of these States for carrying out their assigned tasks in any given case is likely to be uneven. Some are economically deeply involved with the target State and apt to suffer painful economic losses (see below). Others may, on principle or for particular political reasons, not be in agreement with the Council as to the imposition or the continuation of sanctions. Also, some States may not really be in full control of their nationals, who might take advantage of an official breach of trade relations in order to smuggle goods at a profitable markup. These States may also lack the domestic legal mechanism for banning their nationals from forbidden trading and must install it (perhaps through parliamentary action) before it can be effective.

For all these reasons, fully voluntary compliance is apt to be an uneven affair, with immediate compliance low but strengthening over time, until perhaps international enthusiasm for the sanctions regime flags and compliance slips again.<sup>50</sup> In imposing sanctions, the Security Council therefore normally requests States to report on the legal and practical measures that they have taken to comply, and to require their nationals to do so. In most instances the Council also establishes a Sanctions Committee (see below), whose primary charge is to monitor compliance with sanctions, partly on the basis of the reports received from States. These are naturally likely to be somewhat self-serving and States in serious noncompliance are apt to fail to submit reports at all. The Committee is normally also authorized to receive reports, usually from other States, about instances of noncompliance.

In some instances the Security Council has established formal control mechanisms, in particular by authorizing interested States to monitor sea lanes leading to the target country.<sup>51</sup> When that country also has land borders, and especially if transit trade passes through it which the Council is not eager to disrupt, monitoring becomes more difficult. This was especially true in respect



of the sanctions imposed on the FRY, and even more particularly of those on the Republika Srpska, which shares a long border with the FRY. Though various attempts were made, the sanctions on Yugoslavia, while not entirely ineffective and in many ways painful, were notoriously leaky.<sup>52</sup> In its recent resolution on sanctions, the General Assembly emphasized the importance of compliance by member States and made various recommendations concerning their role as well as that of the Council in improving monitoring of and compliance with sanctions.<sup>53</sup>

At times, the Security Council has authorized a form of blockade designed to prevent forbidden cargo from entering or leaving the targeted State.<sup>54</sup> Typically, such measures are easier to maintain along a sea coast than along a land border. It should be noted that such a use of military force is generally not considered to be an exercise pursuant to Charter Article 42, but rather a means of implementing economic sanctions ordered under Article 41 and carried out under the aegis of that provision.

**Sanctions Committees.** In connection with almost every sanctions regime, the Security Council has established a Sanctions Committee as a subsidiary organ of the Council. The structures of all these bodies are essentially identical: all fifteen members of the Council are represented, which means that each year five of the nonpermanent members are replaced. The actual participants are lower-ranking members of the respective delegations. In the case of the United States and some of the other permanent Council members these representatives are specialists in sanctions questions and are supported by an appropriate infrastructure (i.e., contacts in the Departments of State, Defense, Treasury, Commerce, and probably the intelligence community), while the nonpermanent members are mostly represented by junior-level diplomats working part-time on these issues. As a number of such Committees function at the same time, the total burden of participation can be heavy. The chairmen of these Committees are chosen from among the nonpermanent members and serve for at least a year (unlike the monthly rotation of Council Presidents). The Secretariat generally services these Committees in only a formal way (i.e., arranging for meetings and for the flow of documentation), without substantive support in terms of economic or other analysis. As the composition of each Committee is identical to that of the Council, formal reports are rare (each representative presumably keeps his delegation sufficiently informed). This arrangement deprives the rest of the UN membership of insight into the work and decisions of these important bodies. Accordingly, and although annual reports from each Committee to the Security Council are now required,<sup>55</sup> a

General Assembly resolution has called for greater transparency in their work.<sup>56</sup>

The Committees work by consensus, with certain decisions normally taken on a no-objection basis. In particular, those decisions authorizing humanitarian shipments are circulated to all Committee members. If none objects within a given time frame, they are deemed approved; however, any representative may put an indefinite hold on any approval, without stating a reason. Under the consensus rule such a hold cannot be broken without the consent of the objecting representative.

Each Sanctions Committee receives special assignments in the Council resolution establishing it; subsequent resolutions often expand these assignments. In general, the tasks are the following:

- To monitor the implementation of sanctions, by reviewing the compliance reports submitted by States and considering information received from other States about violations, and by reporting violations to the Council<sup>57</sup>
- To consider applications for exceptions and exemptions provided for by the Council, mostly for humanitarian purposes (see below)<sup>58</sup>
- To consult, on behalf of the Council, with States alleging special economic problems arising out of their compliance with sanctions (see below).<sup>59</sup>

In recent years the Council has also required the Committees to promulgate guidelines to inform those concerned about the application procedures and the circumstances in which these and other types of relief are apt to be granted. A General Assembly resolution has called on the Council to make the mandates of the Committees more precise, to take account of what can be fulfilled in practical terms, and to specify standard approaches to be followed by the Committees.<sup>60</sup>

These Assembly recommendations reflect the fact that over the years dissatisfaction with the performance of the Sanctions Committees has grown. In part, this has been due to their insufficiently precise mandates, to the sheer volume of work in dealing with numerous applications, and to a general unresponsiveness to apparently legitimate concerns of target States and of nontarget States injured by the sanctions regime. The Council itself has responded to some of these criticisms by issuing guidelines in the form of a series of presidential notes in 1995–1996,<sup>61</sup> but the Assembly believes these have not solved all problems.<sup>62</sup>

### **Impact of Economic Sanctions on the Designated Targets**

**Objectives and Types of Sanctions.** The general objective of sanctions is to induce compliance by the target State (or other entity) with the Security



Council demands for particular actions to be taken or discontinued in order to eliminate threats to or breaches of the peace, or acts of aggression.

Some sanctions, in particular arms embargoes, are meant to disable or at least to restrict a government or some other target entity from continuing effectively the proscribed conduct. The prospects of success depend on the extent to which the target authorities are dependent on major and relatively sophisticated weapons systems, whose flow can most easily be controlled. Embargoes on the import of petroleum and other oil products may also have the effect of hindering a war machine heavily dependent on such imports.

For the most part, however, sanctions are designed to exert general pressures on the economy of the target country in the hope that rational considerations will cause the government or the ruling elite to yield on the issues of concern to the Council so as to relieve the pressures on the economy. Unfortunately, this calculation rarely works, for the target States are almost always authoritarian (sometimes it is the very authoritarian and illegitimate nature of the government that provokes the imposition of sanction), in which the general population may suffer, sometimes severely, without being able to induce its government to change its course. As discussed below, if the pressures on the general population become, or at least are deemed to have become excessive, this may raise legal or at least public relations concerns making it difficult for the world community to continue that type of pressure. In some instances, resistance to long-continuing economic sanctions comes less from the target State and more from the traditional trading partners who wish to resume normal commerce, though they may be subtly encouraged to raise their voice by the target State itself.

In some cases the argument for general economic sanctions may not be expressed in such essentially political terms, but rather as an attempt to weaken the country so as to make it less able to carry out the mischief that is of concern to the Council.

Because, as will be demonstrated below, general economic sanctions have only rarely proven to be effective, and because they may inflict possibly undue pain on an essentially impotent population and significantly burden neighboring States, other types of sanctions have been tried and are coming increasingly into favor. For example, in many of its recent resolutions (e.g., those relating to Iraq, Angola, and Sierra Leone), the prohibition is on travel by governmental figures, particularly those held especially responsible for the acts that provoked the Security Council, as well as by their families, or generally by the elite of the country. Though perhaps these restraints may also not prove effective, they at least target for discomfort those who bear some responsibility for the situation, rather than the arguably innocent and impotent masses.

Another type of sanction that has been used from time to time and that has in a few instances proven to be surprisingly effective without significant side effects have been cultural sanctions, in particular the exclusion of athletes of the target country from international sports competitions.<sup>63</sup> In respect of South Africa and of the Federal Republic of Yugoslavia, these exclusions, evidently for psychological reasons, struck peculiarly sensitive nerves, and the rulers of these countries were prepared to make significant concessions to terminate them.

***The Actual Effectiveness of Economic Sanctions.*** Reviewing the history of the application of economic sanctions and the consequences thereof, the picture, based on a few prominent examples, is rather mixed.

- The government of *Southern Rhodesia*, which was exposed for well over a decade to economic sanctions, in particular as to the import of petroleum products, eventually yielded and in negotiations under the auspices of the British government agreed to the arrangements that established the State of Zimbabwe. Although the long-continued sanctions were probably a factor (they were to an extent always neutralized by South Africa, itself a pariah State), probably more important was the continuing and increasingly savage civil war supported by neighboring States.

- *South Africa* was technically subject only to an arms embargo, which caused it to build up, albeit at considerable expense, an autonomous arms industry. However, though general obligatory economic sanctions were blocked in the Security Council by Western vetoes, the General Assembly recommended such sanctions to all States. Though not binding on UN members, more and more complied. Once the United States did so too (because of domestic political concerns), the pressures of the South African business community on the government became significant and almost surely contributed to the unexpectedly peaceful denouement.

- *Iraq* was clearly not deterred by the severe economic sanctions imposed immediately after its invasion of Kuwait. Although there were some significant arguments before the Coalition air attacks were unleashed some five months later, that more time should be allowed for the economic sanctions to work (arguments that were countered by pointing to the increasing suffering of the Kuwaiti people under the continuing occupation), the very fact that the destruction wrought by six weeks of practically unrestrained bombing was also insufficient to cause Iraq to leave Kuwait suggests that no severity or extent of economic sanctions could have achieved that result. The continuation of the practically unrelieved sanctions into the postwar period (including a severe ban



on all but humanitarian imports and also on the export of Iraq's one commodity, oil—though these have lately been considerably eased) is designed to encourage Iraqi cooperation with a number of Council objectives, such as the monitoring of arms facilities, the return of Kuwaiti prisoners and captured property, and eventually the financing of the UN Claims Commission. However, it is not clear that the sanctions have induced Iraq to become in any way more cooperative. Rather than complying willingly, it is instead mounting a massive propaganda campaign against the continuation of the sanctions regime.<sup>64</sup>

- The *Federal Republic of Yugoslavia* was subjected to increasingly severe economic, cultural, and diplomatic sanctions starting in 1992, for the most part because of its intervention in the Bosnian civil war on the side of the Bosnian Serbs (Republika Srpska). These sanctions, though never implemented fully because of Yugoslavia's many land borders<sup>65</sup> with States that were either somewhat sympathetic to the Serb cause or were for political or economic reasons not in a position to oppose Yugoslav interests too directly, were effective enough to cripple the FRY economy and give rise to an enormous black market conducted by associates of the ruling officials. To secure an easing of these sanctions, President Milosevic of Serbia agreed in September 1994 to cut off assistance to the Bosnian Serbs. As a result, a few economic and cultural sanctions on the FRY (but not the Republika Srpska) were suspended for a series of hundred-day periods.<sup>66</sup> At the conclusion of each the Council examined FRY's behavior before granting a further extension.<sup>67</sup> After the Dayton Accords all the remaining sanctions were first suspended indefinitely,<sup>68</sup> and then terminated on the basis of compliance reports from those implementing the agreements.<sup>69</sup> It can thus be said that these sanctions had at least been moderately effective.<sup>70</sup>

- The *Socialist Federal Republic of Yugoslavia* and after its dissolution all of its successor States were subjected to a complete arms embargo from 1991<sup>71</sup> until 1996.<sup>72</sup> That embargo, though never particularly effective (especially against the Serbs, who inherited most of the enormous arms stocks of the SFRY) because of the many land borders the successor States had with sympathetic States, succeeded in somewhat reducing the flow of heavy and modern armaments into Bosnia and Herzegovina, where they would have threatened UN and other international forces. In particular, the Bosnian Muslims complained that the embargo unfairly prevented them from exercising their inherent right of self-defence, a complaint that found a sympathetic ear in the United States, which at least passively abetted a flow of arms to them.<sup>73</sup>

Altogether, there is no unambiguous answer to the question of the effectiveness of economic sanctions, except to say that if they work at all they appear to require long-term application.

Critics have pointed out that one reason for both the frequent ineffectiveness of economic sanctions and for our uncertainty about their operations is that the United Nations has not been in a position, in considering the imposition of sanctions, to make any detailed projections as to their likely effect, and during their actual application to secure any but anecdotal evidence about their actual effectiveness and their impact on the target State. Thus, whether or not economic sanctions could actually be effective if applied scientifically, this has never actually been done. At most, the Organization has relied on studies prepared by the governmental services of some of the permanent members, studies which were not shared with the United Nations itself but which presumably motivated the decisions proposed by their representatives in the Security Council and Sanctions Committees.

It might be pointed out that part of the difficulty in dealing objectively and scientifically with this subject is a terminological one. The "effectiveness" of sanctions can refer to any of three distinct calculations: (1) the extent to which States actually comply with the Security Council directives to cut off the flow of commerce or finances to and from the target State; (2) the extent to which such a cut in the international flow of resources actually impacts on the economy of the target State; (3) the extent to which the target State actually modifies its behavior as a result of the impacts on its economy.

***Legal Constraints on Economic Sanctions.*** The long-continued economic sanctions on the FRY and especially those on Iraq have raised the specter of undue harm to the most vulnerable members of the target society: children and the women who care for them, the elderly, and the sick. It is true that these sanctions regimes, as adopted by the Security Council, invariably exempted the supply of food and medicines for humanitarian purposes and that the respective Sanctions Committees were given broad powers to grant effective relief. Against this, the target States and their sympathizers claim that the Sanctions Committees, as they actually operate, are far too prone to allow indefinite and unexplained holds on proposed humanitarian shipments. In addition, it is claimed that because the foreign assets of target States are frozen and their exports blocked, these States are not in a position to purchase even the humanitarian supplies that they would be permitted to import.

Naturally, the proponents of sanctions deny the allegations of undue harshness in the implementation of sanctions regimes; they countercharge that



the target States generally appear to have sufficient hidden assets to finance the import of luxury goods for their elites and even extensive armament programs, that their governments often distribute available humanitarian supplies unfairly, and that extensive black markets are allowed to flourish for the benefit of those close to the government.

From a legal point of view it is undoubtedly true that even the United Nations and the Security Council, and of course all States, are bound by universally applicable humanitarian principles that forbid the starvation of civilian populations<sup>74</sup> and that call for special care to be taken to protect vulnerable persons.<sup>75</sup> To give precision to these concepts, the General Assembly has called for further attention to the concept of the "humanitarian limits of sanctions" and proposed that "standard approaches should be elaborated by the relevant United Nations bodies." At the same time, the Assembly has made a number of pertinent operational recommendations.<sup>76</sup>

### **Impact of Economic Sanctions on Third States<sup>77</sup>**

It was recognized already in the Covenant of the League of Nations that a universal obligation to impose economic sanctions on peace-breakers might require mutual support in order to minimize the loss and inconvenience resulting from such economic measures.<sup>78</sup> The UN Charter preserved this rule in Article 49. It also added Article 50, which, although going somewhat further, ultimately contents itself with granting States "confronted with special economic problems arising from the carrying out of [preventive or enforcement] measures" only "the right to consult the Security Council with regard to the solution of these problems."

When this Article was being formulated at the San Francisco Conference, several initiatives for strengthening it were turned down. These included a South African proposal that a State suffering economic damage from sanctions not directed against it should be able to charge the target State, through the Security Council, to pay compensation;<sup>79</sup> another was a Venezuelan proposal that if approached by a State that had suffered damage, the Council would be obliged to take corrective measures.<sup>80</sup> From the text adopted, it appears clear that the State concerned has no "right" except to consult the Council. Incidentally, what pertains to economic difficulties arising directly from a State's application of sanctions, applies even more strongly to those that merely suffer from the general economic distortions resulting from the sanctions regime.

The question then arises what steps the Security Council could take to relieve a complainant State. Though not specified in Article 50, it appears from Article 48(1) that the Council could excuse a State from participating in the imposition of the sanctions. In the World Court's advisory opinion in the *Certain Expenses* case it is suggested that the Council could provide for the United Nations to pay compensation to such a State, the costs of which would then be assessed on all members as expenses of the Organization.<sup>81</sup>

In practice, from the very first time that the Security Council imposed broad economic sanctions, i.e., those on Southern Rhodesia, neighboring States that were especially affected have sought to resort to Article 50. Indeed, this has been the case in respect of all such broad sanctions—but of course not in those instances when the embargo was merely on the sale of arms or on communications, or on cultural or diplomatic intercourse. The Council, in turn, has generally referred these States to the respective Sanctions Committee, charging these with giving the complainant States a hearing but not authorizing the Committees to grant any specific relief.

In no instance has a Sanctions Committee recommended the exemption under Article 48(1) of a complainant State from the obligation to participate in the sanctions regime.<sup>82</sup> Further, in no instance has consideration been given to compensating directly such a State from the UN budget. Instead, the Committees, or the Council on their recommendation, have issued general appeals to the international community, that is to other States and competent IGOs or organs, to assist particular States or the affected States in general. Though there has been some response to these appeals and assistance has been provided to the most severely affected States, in general the relief provided has been in no degree commensurate with the damage caused or at least claimed.<sup>83</sup> The result has been that the burden of sanctions has remained distributed most unevenly among member States, generally with the target's neighbors or its traditional trading partners affected much more severely than others, especially the permanent members of the Security Council.<sup>84</sup>

For some years affected States have been taking their complaints to the General Assembly, which has launched several studies and considerations on this subject.<sup>85</sup> Some of the Assembly's latest recommendations are set out in its above-mentioned resolution on sanctions, which in this respect merely recommends that the Assembly itself and other relevant organs "should intensify their efforts to address the special economic problems of third countries affected by sanctions regimes" and that the subject be studied more intensely in the near future.<sup>86</sup> Other recommendations, also calling mostly for further studies, appear in the 1997 resolution on "Implementation of the



Provisions of the Charter of the United Nations Relating to Assistance to Third States Affected by the Application of Sanctions.”<sup>87</sup> The Secretary-General had already suggested in the 1992 *An Agenda for Peace* that the Security Council devise a set of measures involving financial institutions and the UN system “to insulate States from such difficulties.”<sup>88</sup>

### Conclusions

Unlike “sanctions” imposed by individual States or groups of States, the legality of which have become ever more suspect over the past decades and particularly in recent years, the legal foundations of economic sanctions imposed by the Security Council under Article 41 of Chapter VII of the Charter are solidly founded in international law. However, this does not mean they are not problematic.

One difficulty, of what initially may appear to be primarily a practical nature, is that in the past almost no collective efforts (as distinguished from those of individual members, in particular the permanent members of the Security Council) have been made to establish on the basis of thorough economic and political studies what sanctions can sensibly be applied to a target State, what their likely impact would be on the target and on other States, how well sanctions are actually implemented, and what their actual effects are over time. Thus, this potentially devastating economic weapon is being used without proper guidance or control. In particular, it is difficult to tell, because of the dearth of significant information on most sanctions regimes, whether their impact is proportionate to the benefit sought. Evidently, the possible infliction of major harm that may or may not conform to the general rule of proportionality is problematic from a legal point of view.

Secondly, it is necessary to address the essentially legal issue of the “humanitarian limits of sanctions,” i.e., whether some economic sanctions may not be applied or continued indefinitely if their impact on vulnerable populations is excessive. While it seems clear that in principle there must be some limits, the difficulty is in deciding whether in a given case the ostensible effects of the sanctions imposed are indeed excessive, and if so whether the cause for that excess lies in the rules establishing the regime in question, in the implementation of that regime by the competent Sanctions Committee, or perhaps in the authorities of the target State, which may deliberately distribute the resources available to it in such a way as to put even legitimate sanctions in an unfavorable light.

Finally, the problem recognized in Article 50 of the UN Charter, that is the collateral damage that a sanctions regime may impose on innocent third parties, has so far not been satisfactorily or systematically addressed. The hardship caused by these regimes is thus most arbitrarily and unevenly distributed, sometimes burdening the weakest and often uninvolved States rather than those more responsible for their imposition and better able to bear the burden.

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### Notes

1. See Randelzhofer, *Article 2(4)*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 106, 112 (Simma ed., 1994).
2. U.N. Doc. A/RES/2131(XX) (1965), at annex, para. 2.
3. U.N. Doc. A/RES/2625(XXV) (1970), at annex.
4. U.N. Doc. A/RES/36/103 (1981).
5. U.N. Doc. A/RES/50/96 (1995).
6. U.N. Doc. A/RES/51/22 (1996); *see also* U.N. Doc. A/RES/51/103 (1996).
7. Respectively U.N. Docs. A/RES/52/181 (1997), adopted by a vote of Y = 109, N = 1 (USA), A = 50; and A/RES/52/120 (1997), adopted by a vote of Y = 91, N = 46, A = 26.
8. The report of the expert group is summarized in part IV (paras. 53–94) of U.N. Doc. A/52/459 (1997).
9. *Id.*, para. 73.
10. *Id.*, sub-paras. 76(a)-(g).
11. U.N. Docs. A/RES/47/19 (1992), 48/16 (1993), 49/9 (1994), 50/10 (1995), 51/17 (1996), and 52/10 (1997).
12. *See IAEA Safeguards: Sanctions*, Part II of FISCHER AND SZASZ, *SAFEGUARDING THE ATOM: A CRITICAL APPRAISAL* (Goldblat ed., 1985); and Szasz, *Sanctions and International Nuclear Controls*, 11 *CONN. L.R.* 545 (1979).
13. Montreal Protocol on Substances that Deplete the Ozone Layer, 1987, arts. 4 & 8, 1522 U.N.T.S. Reg. No. 26369, 26 *I.L.M.* 1550 (1987).
14. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1993, art. XII.3 and pt. VII, para. 31, of the Annex on Implementation and Verification, 32 *I.L.M.* 800, 819 & 859 (1993).
15. The only instance appears to be the informal exception granted to Jordan by the Iraq Sanctions Committee from the obligation to discontinue all oil imports from Iraq—in practice its only source.
16. *See, e.g.*, U.N. Doc. S/RES/757 (1992), para. 11, in which the Security Council, in connection with the imposition of comprehensive economic sanctions on the Federal Republic of Yugoslavia (FRY), calls on all States and IGOs to act strictly in accordance with the resolution “notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into . . . prior to the date of the present resolution.”
17. This study will examine *infra* the past practice with respect to implementing Charter Article 50 and some recent proposals made by the General Assembly in this regard.
18. *See, generally*, Martin and Laurenti, *The United Nations and Economic Sanctions: Improving Regime Effectiveness*, Paper No. 5 of the UNA-USA International Dialogue on the Enforcement



of Security Council Resolutions (UNA-USA, August 1997). See also Eisemann, *Article 41, in La Charte des Nations Unies: Commentaire article par article* 692 (Cot & Pellet eds., 1985) and Frowein, *Article 41, in Simma, supra* note 1 at 621.

19. The apparent automaticity of the application of these sanctions was considerably weakened by decisions taken by the League Council during the initial years. DOXEY, *INTERNATIONAL SANCTIONS IN CONTEMPORARY PERSPECTIVE* 4 (2d ed. 1996).

20. In the practice of the Security Council it is not necessary that Chapter VII or Article 39 be explicitly referred to—though most of the time one or both of them are—or that the precise words of the Charter be used.

21. Article 2(7) of the Charter prohibits the UN from intervening in matters that “are essentially within the domestic jurisdiction of any state,” an obstacle that can only be surmounted in respect of enforcement measures under Chapter VII of the Charter; hence the somewhat dubious finding in S/RES/733 (1992) that the situation in Somalia constituted a threat to the peace.

22. U.N. Doc. S/RES/748 (1992).

23. It should be noted that Libya turned to the International Court of Justice for relief but could not do so as a direct challenge to the Security Council. Instead, in separate complaints brought against the United Kingdom and the United States, Libya claimed that these States should first have resorted to the disputes resolution mechanism of the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation before turning to the Council. The Court has recently decided that it has jurisdiction (Judgments on Preliminary Objections of 27 February 1998) but the merits have not yet been reached. However, when initially presented to the Court with requests for an indication of provisional measures pursuant to Article 41 of the ICJ Statute, including an injunction against any Security Council sanctions, the Court carefully avoided dealing with a situation that could have brought it into direct conflict with the Council; *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.; Libya v. U.S.)*, Request for Provisional Measures, Order(s), 1992 I.C.J. 3 & 114.

24. See U.N. Doc. A/RES/51/242, annex II, para. 7, referred to in note 42 *infra*.

25. This was first done, by the USSR, at the thirty-ninth meeting of the Security Council. In para. 22 of its advisory opinion on Namibia (South West Africa) (1971 I.C.J. 16, 22), the International Court of Justice accepted this practice by stating that “this procedure followed by the Security Council . . . has been generally accepted by Members of the United Nations and evidences a general practice of that Organization.”

26. U.N. Docs. S/RES/217 (1965), 232 (1966), 253 (1968), 277 (1970), 288 (1970), 310 (1972), 314 (1972), 320 (1972), 327–329 (1973), 333 (1973), 386 (1976), 388 (1976), 409 (1977), 411 (1977), & 460 (1979). In this and the following lists of sanction-related resolutions only those are included that relate directly to that subject, while resolutions solely on other matters (such as the deployment of UN forces) are not included.

27. U.N. Docs. S/RES/418 (1977), 421 (1977), & 919 (1994).

28. U.N. Docs. S/RES/661 (1990), 665 (1990), 666 (1990), 669 (1990), 670 (1990), 706 (1991), 712 (1991), 778 (1992), 986 (1995), 1051 (1996), 1060 (1996), 1111 (1997), 1115 (1997), 1120 (1997), 1134 (1997), 1137 (1997), 1143 (1997), & 1153 (1998).

29. U.N. Docs. S/RES/713 (1991), 724 (1991), 757 (1992), 760 (1992), 787 (1992), 816 (1993), 820 (1993), 942 (1994), 943 (1994), 967 (1994), 970 (1995), 988 (1995), 992 (1995), 1003 (1995), 1015 (1995), 1021 (1995), 1022 (1995), & 1074 (1996).

30. U.N. Doc. S/RES/733 (1992).

31. U.N. Docs. S/RES/748 (1992), 883 (1993), 910 (1994), & 915 (1994).

32. U.N. Docs. S/RES/788 (1992), 985 (1995), 1083 (1996), & 1116 (1997).
33. U.N. Docs. S/RES/841 (1993), 861 (1993), 873 (1993), 875 (1993), 917 (1994), & 944 (1994).
34. U.N. Docs. S/RES/864 (1993), 1075 (1996), 1087 (1996), 1098 (1996), 1102 (1997), 1127 (1997), 1130 (1997), 1135 (1997), 1149 (1998), & 1157 (1998).
35. U.N. Docs. S/RES/918 (1994), 1005 (1995), 1011 (1995), & 1053 (1996).
36. U.N. Docs. S/RES/1054 (1996) & 1070 (1996).
37. U.N. Docs. S/RES/1132 (1997), & 1156 (1998).
38. In the forty-five years up to 1990, the Security Council had adopted some 650 resolutions; as recently as 1987 it adopted only thirteen, mostly short, routine ones. Since 1990 the Council has adopted over five hundred resolutions, as many as ninety-three in 1993 alone, many of these consisting of long and complicated texts.
39. In UN practice, the term "consensus" means that no member of the body concerned is sufficiently opposed to a proposed decision to insist on blocking it. Consensus decisions can thus be taken even though one or more members indicate that they disapprove of certain portions of the agreed text.
40. This dissatisfaction of the General Assembly with the operations of the Security Council also fuels the calls for an increase in the latter's size, in order to make it more "representative." For the present, these calls are resisted by most of the permanent members, without whose ratification no amendment of the Charter (as would be necessary to increase the size of the Council) can enter into force.
41. This term, usually attributed to the late Secretary-General Dag Hammarskjöld, indicates that the so-called "blue helmet" operations, i.e., those in which a lightly armed force is introduced into an area with the consent of all significant parties, and which are not military forces authorized under Article 42 of Chapter VII, do not have any firm basis in the Charter.
42. U.N. Doc. A/RES/51/242 (1997), Annex II: "Question of sanctions imposed by the United Nations," consisting of thirty-nine paragraphs.
43. Under Article 10 of the Charter, the General Assembly may make recommendations to the Security Council but, unlike certain recommendations made by the Council to the Assembly that are at least negatively binding (i.e., the Assembly need not act on them but may not take a decision that disregards them), those made by the Assembly are in no way binding on the Council.
44. U.N. Doc. A/RES/51/242 (1997), Annex II, paras. 3 & 6.
45. This was done in respect of certain economic and cultural sanctions against the FRY, which were suspended for successive hundred-day periods starting in September 1994 (Security Council Resolution 943 (1994)), which suspension was renewed by Resolutions 970 (1995), 988 (1995), 1003 (1995), & 1015 (1995), after which all sanctions were suspended indefinitely by Resolution 1022 (1995) and terminated by Resolution 1074 (1996).
46. See S/RES/1022 (1995), which provided that the remaining economic sanctions on the FRY would be suspended indefinitely but must automatically be reinstated five days after the UN Secretary-General reports on possible failures of performance by the FRY, or five days after the "High Representative" for Bosnia or the commander of the NATO force reports on any noncompliance, unless the Council decides otherwise (by a vetoable decision). The resolution also specified the conditions for the ultimate termination of the sanctions.
47. U.N. Doc. S/RES/864 (1993).
48. U.N. Doc. S/RES/942 (1994). Special provisions concerning this Bosnian Serb entity also appear in S/RES/1022 (1995).
49. U.N. Doc. S/RES/1132 (1997), paras. 5 & 10(f).



50. Fortunately, there have been few instances in which a State has openly and formally breached sanctions imposed by the Security Council under Charter Chapter VII, such as the 1971 U.S. "Byrd Amendment" (P.L. 92-156, 50 U.S.C. 98h-4) defying the embargo on Southern Rhodesia's sale of chrome; that provision was adopted by Congress in spite of the special appeal in A/RES/2765 (XXVI) of 17 November 1971 and was upheld in *Diggs v. Schultz*, 470 F.2d 461 (D.C. Cir., 1972); cert. den. 411 U.S. 931, with the Circuit Court holding that even though the law was "in blatant disregard of our treaty undertakings" it had no power to reverse this congressional action.

51. *E.g.*, U.N. Doc. S/RES/665 (1990), directed at Iraq.

52. See the third (final) report of the Chairman of the Yugoslav Sanctions Committee (U.N. Doc. S/1996/946).

53. U.N. Doc. A/RES/51/242 (1997), annex II, paras. 10-13.

54. In the first instance in which this was done, the Council in 1965 called on the United Kingdom to use necessary measures to prevent a tanker from delivering oil to Southern Rhodesia (U.N. Doc. S/RES/221 (1996)). In respect of Iraq, the Council authorized a maritime force (U.N. Doc. S/RES/665 (1990)). See Rosenzweig, *infra* note 65, at 173-74.

55. As specified in a note from the President of the Security Council (U.N. Doc. S/1995/234).

56. U.N. Doc. A/RES/51/242 (1997), Annex II, para. 33.

57. *E.g.*, U.N. Doc. S/RES/1132 (1997), para. 10(a)-(d), in respect of sanctions on Sierra Leone.

58. *Id.*, para. 10(d)-(e).

59. *E.g.*, U.N. Doc. S/RES/669 (1991) in respect of sanctions on Iraq.

60. U.N. Doc. A/RES/51/242 (1997), Annex II, paras. 27-28.

61. See U.N. Docs. S/1995/234, S/1995/438, S/1996/54.

62. U.N. Doc. A/RES/51/242 (1997), Annex II, para. 29, as well as paras. 27-39 generally.

63. See, *e.g.*, paras. 8(b) and (c) of U.N. Doc. S/RES/757 (1992) in respect of the FRY.

64. For many years the Security Council offered to allow Iraq to sell substantial quantities of oil, provided that 30 percent of the proceeds would be allocated to the United Nations to reimburse it for the costs of its Iraqi operations and mainly to fund the Compensation Commission established to help assist those who had suffered losses due to the Iraqi occupation of Kuwait (*e.g.*, Kuwaiti citizens, guest workers who had been suddenly expelled, private enterprises, etc.). The rest of the proceeds were to be used for humanitarian purposes, for the most part distributed by the Iraqi government under UN supervision but with a specified fraction distributed directly by the United Nations to the Kurds (U.N. Doc. S/RES/706 (1991)). However, for several years the government refused this offer, until it finally accepted, after long negotiations, the arrangements set out first in Resolution S/RES/986 (1995) and in a related Memorandum of Understanding with the Secretary-General, and then renewed by Resolution S/RES/1111 (1997). A considerable increase in the volume of these oil sales is allowed by Resolution S/RES/1153 (1998).

65. These borders were in part patrolled by Sanctions Assistance Missions (SAMs), consisting of teams of customs officials from Western countries, who had no powers to enforce sanctions but only to assist the neighboring States in improving their compliance. See Rosenzweig, *United Nations Sanctions: Creating a More Effective Tool for the Enforcement of International Law*, 1995 AUSTRIAN J. OF PUBLIC AND INT'L L. 161, 175-76.

66. U.N. Doc. S/RES/943 (1994).

67. U.N. Docs. S/RES/970 (1995), 988 (1995), 1003 (1995), 1025 (1995).

68. U.N. Doc. S/RES/1022 (1995).

69. U.N. Doc. S/RES/1074 (1996).

70. A particularly valuable report on the Yugoslav sanctions experience was prepared by the Organization for Security and Cooperation in Europe (OSCE) on the basis of the Copenhagen Round Table on United Nations Sanctions in the Case of the Former Yugoslavia, 24–25 June 1996 (U.N. Doc. S/1996/776). The Yugoslav Sanctions Committee submitted its third and final report on 15 November 1996 (U.N. Doc. S/1996/946).

71. U.N. Doc. S/RES/713 (1991).

72. U.N. Doc. S/RES/1021 (1995), providing for a phased lifting of the arms embargo.

73. It would appear that the complaint to the ICJ brought by Bosnia and Herzegovina against the FRY in 1993 accusing the latter of committing genocide had at least as an important purpose that the ICJ propose provisional measures under Article 41 of its Statute to the effect that the arms embargo should be lifted in respect of Bosnia, because it prevented the Bosnian government from protecting its people against genocide; the Court had no difficulty in twice turning aside these specific requests for an indication of provisional measures which, if granted, would have brought it into direct conflict with the Security Council (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Federal Republic of Yugoslavia), Provisional Measures Order of 8 April 1993, 1993 I.C.J. 3, 32 I.L.M. 888 (1993); Provisional Measures Order of 13 September 1993, 1993 I.C.J. 325, 32 I.L.M. 1599 (1993)).

74. See Protocol I to the 1949 Geneva Conventions, 1977, art. 53(1), 1125 U.N.T.S. 3, 16 I.L.M. 1391 (1977).

75. *Id.*, arts. 1, 2, 51, and Geneva Convention IV relative to the Protection of Civilian Persons in Time of War 1949, art. 16, 75 U.N.T.S. 287, 6 U.S.T. 3516, T.I.A.S. 3365.

76. U.N. Doc. A/RES/51/242, annex II, paras 14–20.

77. Burci, *The Indirect Effects of United Nations Sanctions on Third States: The Role of Article 50 of the UN Charter*, 1995 AFRICAN Y.B. INT'L L. 157. See also Eisemann, *Article 50*, in Cot & Pellet, *supra* note 18, at 761, and Bryde, *Article 50*, in Simma, *supra* note 1, at 659.

78. COVENANT OF THE LEAGUE OF NATIONS art. 16.3.

79. IV U.N.C.I.O. 668–69.

80. IV U.N.C.I.O. 263.

81. Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 167. This suggestion was discussed in an opinion by the UN Legal Counsel (1976 UN JURIDICAL Y.B. 203).

82. See note 15 *supra*.

83. It would appear that one of the most effective relief operations was that mounted, largely on the initiative of the United States, by the Gulf Crisis Financial Coordination Group, persuading financially able States to assist some of those most directly affected by the Iraqi action or by the measures taken against Iraq; however, all this happened essentially outside the UN framework.

84. See the series of reports by the UN Secretary-General on “Economic Assistance to States Affected by the Implementation of the Security Council Resolutions Imposing Sanctions on the Federal Republic of Yugoslavia,” U.N. Docs. A/48/573, A/49/356, A/50/423, A/51/356, A/52/535.

85. See, in particular, the extensive catalogue of such reports set out in subparas. (a)–(h) of the fourth preambular para. of U.N. Doc. A/RES/52/162 (1997).

86. A/RES/51/242 (1997), Annex II, paras. 24–26.

87. A/RES/52/162 (1997).

88. U.N. Doc. A/47/277-S/24111, para. 41.





# XVIII

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## The International Criminal Tribunal and Subpoenas for State Documents

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Ruth Wedgwood

THE CONTEMPORARY ENFORCEMENT of international humanitarian law faces a world different from Nuremberg. The World War Two Allies, confronted with criminality of staggering proportions, conducted the trials of Nazi leaders after Germany's unconditional surrender. Captured Nazi archives provided a documentary outline of the Reich's unimaginable plans and Allied military occupation of Germany allowed the Nuremberg prosecutors direct access to witnesses.

In prosecuting war crimes in modern civil conflicts, the judicial starting point is transformed. The internationalization of war crimes prosecutions is seen as a way to restore confidence and allow reconciliation. But prosecutions may begin while a conflict is still underway. Achievement of a ceasefire or peace agreement does not mean that former belligerents welcome the prospect of being held responsible for serious violations of international humanitarian law. International peacekeepers can separate opposing forces and protect international aid workers, yet are unlikely to have a force structure sufficient to protect all potential witnesses against irregulars and hooligans. There is no occupation government that displaces the civil administration of the former belligerents. While political sentiment may change over time, the wartime



political parties are likely to remain influential long after the fighting stops. Former belligerents will lack credibility in trying war crimes accusations against their own forces and their opponents. International war crimes prosecutors will also be hard put to rely on the belligerents for the faithful collection of evidence and eyewitness testimony.

What this means for war crimes prosecutions is brought home in the experience of the International Criminal Tribunal for the former Yugoslavia. The Tribunal was created by the United Nations Security Council in 1993 under Chapter VII,<sup>1</sup> in the middle of the armed conflict in Bosnia and Herzegovina. In November 1995, while the Dayton Peace Accord was under negotiation, the Tribunal indicted a number of defendants for their roles in ethnic cleansing in the Lasva Valley. A prominent defendant was Colonel Tihomir Blaškić, who held the position of regional military commander for the Croatian Defense Council of Herceg-Bosna, an internationally unrecognized Bosnian Croat entity within the Republic of Bosnia and Herzegovina.<sup>2</sup> Blaškić surrendered to the Tribunal on April 1, 1996, and was permitted to remain under house arrest in The Hague.

### The Blaškić Subpoenas

On January 15, 1997, the Tribunal Prosecutor issued trial subpoenas for the production of records from, variously, the Government of Croatia, Croatian Defense Minister Gojko Šušak, the Government of Bosnia and Herzegovina, and the custodian of records of the central archive of the former Ministry of Defense of Herceg-Bosna. These subpoenas have become the center of controversy. The practical outcome of the case may define whether an international criminal tribunal is able to function effectively as a truth-determining forum, for the advantages of impartiality and credibility enjoyed by an international tribunal are of little use if such a court cannot procure the production of evidence necessary to a fair and accurate adjudication. The subpoena dispute tests whether an international court can effectively substitute itself for national tribunals in the trial of war crimes, genocide, and crimes against humanity.

The evidence requested in the subpoenas *duces tecum* addressed to the Republic of Croatia and to Bosnia and Herzegovina focuses on military operations in Central Bosnia. The requested disclosures were broad, and came surprisingly late in the trial process, more than a year after the original Blaškić indictment. The subpoena to Croatia included requests for Blaškić's notes and writings sent to the Croatian Ministry of Defense and to the

defense authorities of Herceg-Bosna, communications received from those quarters, communications between the Croatian Ministry of Defense and other officials of Herceg-Bosna, records on Croatia's contribution of weapons, supplies, and military units to the Bosnian conflict, and files on investigations or prosecutions concerning the 1993 attacks against Muslim civilians in Ahmici and other villages in the Lasva Valley.

The scope of the prosecutor's demand might seem ambitious until one recalls that proving grave breaches of the Geneva Conventions requires evidence that the Bosnia conflict was "international" in each particular sector of the fighting. Otherwise, according to the Tribunal's earlier decisions in the Tadić case,<sup>3</sup> the charges of grave breach cannot be sustained, since the universal jurisdiction of grave breaches only applies in international conflicts. In the case of Tihomir Blaškić, an officer of the Croatian Defence Council ("HVO") of the Croatian Community of Herceg-Bosna, it is Croatia's involvement with the HVO and the fighting in central Bosnia that will determine the international nature of the conflict for purposes of grave breaches of the Geneva Conventions.

Many of the subpoenaed records are also central to the proof of command responsibility. Command responsibility holds that it is not sufficient to place liability on the foot soldier who carries out an illegal action or atrocity. Rather, a system of restraint in wartime depends on the role of a commanding officer in controlling his troops, and his duty in the chain of command to prevent and punish wanton acts. A commanding officer is to be held criminally liable for *failing to attempt to control* his troops where he knows that widespread atrocities are being committed, as well as for ordering troops to take such reprehensible action. This is a necessary part of deterrence, and the moral responsibility and retribution which criminal law seeks to serve.

Proof of command responsibility is likely to come from one of two sources—the testimony of military personnel about the commander's orders and actions or the documentary record of a military operation, including copies of written orders and communications. Either way, the information must come from "official" sources.

Command responsibility is central in the charges against Blaškić. He may not have personally participated in the murders and mayhem committed against Muslim civilians in 1993 in the Lasva campaign area. Rather, Blaškić will bear criminal responsibility if he ordered or encouraged his troops to engage in the atrocities,<sup>4</sup> or if he failed to monitor or control their actions, allowing the troops to run amok.<sup>5</sup>



A more controversial theory of command responsibility might dispense with the need for any particularized evidence. Criminal liability could flow, on an aggressive theory, from the simple fact of the defendant's position in the chain of command and the widespread commission of atrocities by troops under his command. But even if this were an attractive theory—and, to be clear, it is not provided for by the Tribunal's statute<sup>6</sup>—the defendant must surely be permitted an affirmative defense, to show that he justifiably did not know of the misconduct, or made efforts to stop its execution. "Official" sources are likely to be important for exculpatory evidence.

In cases between sovereign States, the fact-finder ordinarily relies upon the State parties to produce pertinent evidence. There is no general right of "discovery" against the opposing State in an international adjudication, say, before the International Court of Justice, although a special master can be assigned to investigate and report to the Court and an adverse inference can be drawn from a State party's failure to muster proof.<sup>7</sup> Each State is required to make its case, based on its own records and witnesses, and is free to judge whether to disclose sensitive documents to strengthen the case, or to retain the advantages of confidentiality.

Criminal trials are a different matter. They are not State-to-State contests. A criminal conviction deprives an individual of his liberty and reputation, and involves a rights-based claim to fairness. Criminal proof presumes there will be a completeness of investigation and documentation to give meaning to the high standard for conviction, whether it is phrased as "proof beyond a reasonable doubt" or another test of similar gravity. In a national setting, a criminal court has wide latitude to demand the production of evidence from third parties and even from official sources. In an international setting, individuals do not ordinarily enjoy legal personality, but when placed on trial for international criminal responsibility, they must be guaranteed fair process.

Criminal justice is a newcomer in international fora. The *ad hoc* tribunals created by the Security Council for the former Yugoslavia and Rwanda are the first charged with the international enforcement of the law of war since Nuremberg. It is hardly surprising, then, to have difficult problems of first impression. The question of how to obtain evidence is a fundamental test, both to assure effectiveness in enforcing international humanitarian law, and to assure fairness to individual defendants.

The subpoena *duces tecum* issued in the Blaškić case to Bosnia and Herzegovina was accepted by the Bosnian government, although Bosnia indicated that it could not assure the compliance of a nominally subordinate official, the custodian of records of the former Defense Ministry of

Herceg-Bosna.<sup>8</sup> Croatia, however, disputed the authority of the International Tribunal to issue a subpoena *duces tecum* on several grounds: 1) it is improper to issue a mandatory order to a sovereign State, especially an order that purports to carry a “penalty” for non-compliance, as might be implied by the word “subpoena”; 2) no order can be addressed to a particular State official, here, Croatian Defense Minister Šušak, and States are entitled to decide how to comply with requests for disclosure; and 3) Croatia can withhold information affecting national security, a judgment that Croatia reserves to itself.

Croatia turned over some of the documents requested by the Prosecutor, but continued to challenge the authority of the Tribunal to enforce any subpoena demand. The Tribunal judge who issued the subpoenas, Judge Gabrielle Kirk McDonald of the United States, set down the matter for full briefing and hearing before the three judges of Trial Chamber II, including Judge Elizabeth Odio Benito of Costa Rica and Judge Saad Saood Jan of Pakistan. She also invited *amicus curiae* to address four questions: whether a subpoena *duces tecum* can issue to a State, whether it can issue to a high government official of a State, whether claims of national security privilege must be accepted, and the appropriate remedies in the event of non-compliance.

### The Trial Chamber Decision

On the first question, in a decision rendered on July 18, 1997,<sup>9</sup> the Trial Chamber adroitly placed to one side the distracting controversy over nomenclature. The term “subpoena” is used in the Court’s own rules,<sup>10</sup> but the Trial Chamber noted that the real dispute was “the International Tribunal’s authority and power to issue *binding compulsory orders*, rather than the particular nomenclature used for such orders.”<sup>11</sup> This power could either be granted expressly, or could be inherent in the authority of the Tribunal.

Judge McDonald held that there was such a power. The Tribunal was created by the Security Council under Chapter VII authority as a subordinate organ,<sup>12</sup> yet “must also be possessed of a large degree of independence in order to constitute a truly separate institution and in order to be able to fulfil properly its judicial mandate, free from political considerations.”<sup>13</sup> For a criminal trial chamber, it is “imperative” to have “all the relevant evidence before it when making its decisions,” if only to “guarantee the rights of the accused.”<sup>14</sup> Croatia conceded that the Security Council could have granted the Tribunal the power to issue binding orders against States in an authorizing statute—it was a delegable power—and simply disputed whether the Council had done so.<sup>15</sup> An absence of express power to issue orders against States in the Statute of the



Tribunal would not determine the matter, Judge McDonald found, since the Tribunal's granted powers must also be interpreted to make it an effective institution. A teleological interpretation of the powers of UN organs was relied on by the International Court of Justice in the *Reparations Case*,<sup>16</sup> the *Effects of Awards Case*,<sup>17</sup> and the *Certain Expenses Case*.<sup>18</sup>

The Tribunal must have "the inherent power to compel the production of documents necessary for a proper execution of its judicial function," Judge McDonald concluded.<sup>19</sup> Because many of the crimes within the Tribunal's compass involve military operations, military records "may constitute vital evidence."<sup>20</sup> National courts have the power to compel the production of evidence from third parties, whether in the criminal justice systems of France, Germany, Pakistan, Spain, Scotland, Canada, or the United States.<sup>21</sup> The European Court of Justice enjoys the power to compel State parties to produce all documents and information "which the court considers desirable," and may compel non-party member States and institutions "to supply all information which the Court considers necessary for the proceedings."<sup>22</sup> Similar power was necessary for the International Tribunal for the former Yugoslavia to fairly adjudicate war crimes cases.

The decision did not rest on teleology alone. The Tribunal's Statute sustained the power to gather evidence by compulsory orders, Judge McDonald found. Article 19 of the Statute, approved by the Security Council, entitles a judge to issue "any . . . orders as may be required for the conduct of the trial," and Article 29 requires that States comply with any orders issued by a trial chamber of the Tribunal.<sup>23</sup> The mandatory nature of these measures is hardly surprising in a Tribunal created under Chapter VII authority. The power of the Tribunal to bind States is shown, for example, in the Tribunal's right to require States to defer a national prosecution in favor of the international case. The Report of the Secretary-General on the establishment of the Tribunal similarly notes that orders for the surrender or transfer of defendants "shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations."<sup>24</sup>

On the issue of possible penalties for non-compliance, the Trial Chamber was more reticent, finding the question not necessary for decision. The term "subpoena" is not meant to be a root-and-branch transplant from common law systems, Judge McDonald found; the alternative term "*assignation*" is used in the authentic French text. There is, therefore, no necessary connotation of penalty or coercive action.<sup>25</sup> It remains an open question what penalty, if any, may attend a State failure to comply with an order of production, Judge

McDonald said. And a “penalty” could amount to no more than a “note of non-compliance and reference of the matter to the Security Council.”<sup>26</sup>

Addressing subpoenas to named government officials was also approved by the Trial Chamber. The Tribunal has the power to direct binding orders to States and to private individuals; hence, it broke no barrier to permit their direction to named officials of the government. Although a State may designate a liaison to assist in the production of evidence, it cannot shield particular government officials from the duty of production. “The International Tribunal must have powers that are both practical and effective,” Judge McDonald noted, “and, as a criminal institution, this dictates that it seek the most direct route to any evidence which may have a bearing on the finding of guilt or innocence of the accused.”<sup>27</sup>

However, the Trial Chamber made a considerable concession to the conflicting obligations that may constrain a State official. States and individuals have a duty of compliance with the binding orders of the Tribunal. But a resistant State may interfere with an official’s attempt to comply, and forbid him to turn over desired documents. It could be unfair to place an individual in such a difficult position of conflict, Judge McDonald concluded. On the principle of *ultra posse nemo tenetur*—that an impossible act cannot be required—and because the Tribunal lacks police power to protect individuals against State retaliation, such an official is permitted to explain why compliance is not within his individual choice.<sup>28</sup> Of course, other witnesses may face local retaliation for compliance with orders to testify, but the Tribunal did not say what would happen if an ordinary witness made the same plea.

Judge McDonald also made clear that overbreadth or lack of specificity of a subpoena remains a potentially valid ground for challenge. Looking to national practice, the Tribunal noted that trial subpoenas could not be used for “fishing expeditions,” but had to look toward the production of admissible or potentially admissible evidence. Croatia’s objections on grounds of overbreadth were referred to the separate Trial Chamber conducting the Blaškić trial.<sup>29</sup>

Finally, the Trial Chamber ruled that national security claims deserved careful consideration but not automatic deference.<sup>30</sup> The need for pertinent evidence at trial had to be weighed alongside the valid interest that States may have in the protection of sensitive information. Any blanket exemption would cripple the doctrine of command responsibility, since the records of military operations lie at the center of proof of a commander’s conduct. National security claims have to be made with specificity, and evaluated by the Tribunal in light of the procedures available to minimize the prejudice of disclosure, such



as redaction of documents and closed proceedings. In the last analysis, the responsibility for weighing the concerns belongs to the Tribunal itself.<sup>31</sup>

### The Appeals Chamber Decision

After the decision of Trial Chamber II in July 1997, Croatia immediately took an appeal. Although the Blaškić trial had already begun on June 24, 1997, the Appeals Chamber stayed enforcement of the trial subpoenas.<sup>32</sup> The appeal attracted *amicus curiae* briefs from several governments.<sup>33</sup> The decision was delivered several months later, on October 29, 1997, with an opinion by President of the Tribunal Antonio Cassese,<sup>34</sup> dramatically headlined by the Tribunal's press office as "unanimously quash[ing]" the subpoenas issued to Croatia and Defense Minister Šušak,<sup>35</sup> but importantly holding that "binding orders" could be issued to Croatia,<sup>36</sup> and that there was no absolute national security privilege.

The overall judgment was in fact complicated, but two architectural features are clear. Each calls into some question the future competence of the International Tribunal as a judicial fact-finding body. First, the Appeals Chamber went out of its way to hold that the Tribunal lacks any direct enforcement powers against States to obtain the production of evidence. If a State declines to produce evidence pursuant to a binding order, the Tribunal's only recourse is to report the matter to the Security Council.<sup>37</sup> The Tribunal, in the Appeals Chamber's view, cannot even recommend a course of action to the Council.<sup>38</sup> There is little explanation of this result, especially against a background in which the European Court of Justice is now permitted to sanction States in civil cases.<sup>39</sup> Judge Cassese notes, simply, that "[h]ad the drafters of the [Tribunal's] Statute intended to vest the International Tribunal with such a power they would have expressly provided for it. In the case of an international judicial body, this is not a power that can be regarded as inherent in its functions."<sup>40</sup> The time pressure on the Security Council in creating the Tribunal in 1993 may not warrant such a spare account of the drafters' intention. One can instead take the result as the Appeals Chamber's estimate of what structure will or will not disturb some member countries.<sup>41</sup> The danger, of course, is that this dependency of the Tribunal potentially involves the Security Council in the intimate decisions of the conduct of a trial. Although the failure of a requested country to surrender or arrest an indicted defendant is, under the Court's judge-made rules,<sup>42</sup> also reported to the Security Council, the entry of politics into enforcement is perhaps less troubling at the pretrial stage than to have politics shape the availability of inculpatory and exculpatory

evidence in an ongoing case. The limits of the autonomy of the Tribunal as an independent judicial institution are sharply drawn by this outcome.<sup>43</sup>

One may also wonder why the Appeals Chamber chose to address penalties at this stage of the proceeding, before it is known whether Croatia would comply with the Tribunal's orders of production. Judge McDonald held that it was premature to decide possible penalties for non-compliance. Judge Cassese supposed that this depended on an idea of "ripeness" peculiar only to American jurisprudence, though judicial prudence is surely not so culturally specific. Under a "tariff" theory of jurisprudence, a disobedient party may wish to know the "cost" of his defiance in advance, but a Court wishing to establish its authority does not owe a duty to the recalcitrant to announce in advance the costs and benefits of resistance.

The Appeals Chamber's second restriction was to allow States to decide who can testify as a document custodian.<sup>44</sup> A named official cannot be called to appear in court, the appellate judges held, because States traditionally have had the right under customary international law to decide how they will go about fulfilling their international obligations, and individual officials are insulated from liability for acts undertaken on behalf of the State. But, as the Appeals Chamber remarks without stopping, the major exception to this immunizing rule of "acts of State" has been the law of war crimes and international humanitarian law.<sup>45</sup> It is a fundamental tenet of the modern law of war that State officials cannot take refuge from individual responsibility for illegal acts by invoking a claim of superior orders or State authority. It is surprising then, indeed, that the appeals judges should resurrect a doctrine of "acts of State" when it weakens the very procedures seeking to give teeth to the law of war.

The Court's misstep may be a result of not comprehending the full function of a custodian of documents as an evidentiary witness at trial. Documents cannot be assumed to be authentic, accurate, or complete. A custodian of documents is needed to authenticate the documents as genuine, to describe the routine by which they were kept, to describe how they were searched for and retrieved, and to say whether the run of documents is known to be complete. Even in ordinary conditions of peacetime, all custodians are not created equal—the evidentiary weight of the documents may depend on the persuasiveness of the testimony of the custodian. In the fog of war, with fluid conditions on a military front, the testimony of a custodian of documents is even more critical—to establish, for instance, whether a set of incoming reports from a field commander is preserved in whole or only in part. Commissioning the former belligerent States in the Yugoslav conflict to pick and choose which officials will be available to testify can undercut the strength



of the prosecution's evidence, and imperil a defendant's search for exculpatory evidence.

Equally troublesome is the Appeals Chamber's intimation that the Tribunal may not call *factual eyewitnesses* who happen to be government officials. Although Croatia's challenge concerns document subpoenas, with no issue or decision in the Trial Chamber concerning subpoenas *ad testificandum*, the Appeals Chamber went out of its way to address what eyewitnesses can be subjected to a subpoena or binding order to testify. An individual acting in a private capacity could be subpoenaed before the Tribunal, the Appeals Chamber said.<sup>46</sup> But a State official could not be summoned, either by subpoena or binding order.<sup>47</sup> And on the crucial question of when a witness has acted in an official capacity, the Appeals Chamber gave the following enigmatic explanation:

It should be noted that the class of "individuals acting in their private capacity" also includes State agents who, for instance, witnessed a crime *before* they took office, or found or were given evidentiary material of relevance for the prosecution or the defence *prior* to the initiation of their official duties. In this case, the individuals can legitimately be the addressees of a subpoena. Their role in the prosecutorial or judicial proceedings before the International Tribunal is unrelated to their current functions as State officials.<sup>48</sup>

But if the official witnessed an atrocity at first hand *while serving in office*, the result is more equivocal. The Appeals Chamber posed

the example of a colonel who, in the course of a routine transfer to another combat zone, overhears a general issuing orders aimed at the shelling of civilians or civilian objects. In this case the individual must be deemed to have acted in a private capacity and may therefore be compelled by the International Tribunal to testify as to the events witnessed. By contrast, if the State official, when he witnessed the crime, was actually exercising his functions, i.e., the monitoring of the events was part of his official functions, then he was acting as a State organ and cannot be subpoenaed, as is illustrated by the case where the imaginary colonel overheard the order while on an official inspection mission concerning the behaviour of the belligerents on the battlefield.<sup>49</sup>

It is not entirely clear, from this loosely drafted hypothetical, whether the Appeals Chamber is resting on a distinction between "subpoenas" and "binding orders," but it might appear from the heading of the section—"Whether the International Tribunal May Issue Binding Orders to Individuals Acting in Their Private Capacity"—that the colonel tasked to monitor battlefield

operations is to be insulated from any form of compulsory process. This is an extraordinary *bouleversement*, potentially depriving the Tribunal of a critical source of testimony. A charitable reading of the opinion is to dismiss this as unnecessary dicta and superfluous illustration.

One may also speculate that perhaps the Appeals Chamber was primarily concerned with the *initial addressee* of an order to testify—that a binding order still could be directed to the State in question, requiring the eyewitness testimony of the particular named official. After all, the vital nature of official eyewitness testimony is self-evident. This reading of Judge Cassese's opinion is warranted by his ultimate conclusion that no grave harm should be done to the efficacy of proof. "[I]n the case of State officials there is no compelling reason warranting a departure from general rules [of international law]. To make use of the powers flowing from Article 29 of the Statute, it is sufficient for the International Tribunal to direct its orders and requests to States . . . ." By contrast, Judge Cassese observes, Croatia's claim of an unbounded national security privilege would shield "documents that might prove of decisive importance to the conduct of trials" and would "be tantamount to undermining the very essence of the International Tribunal's functions."<sup>50</sup>

Nonetheless, the impracticality of the Tribunal's etiquette of address remains. The Appeals Chamber notes later that, at least in contacting private individuals, it "might jeopardise investigations" to go through the governments of former belligerent States or entities, "some authorities of which might be implicated in the commission of these crimes."<sup>51</sup> This would seem equally true in the case of official eyewitnesses who formerly served as officials or employees of the belligerent governments.

Despite the general immunity of international organizations from judicial process, the Tribunal does not extend the umbrella of "public capacity" to members of international peacekeeping forces. If a member of UNPROFOR, IFOR, or SFOR "witnesses the commission or the planning of a crime in a monitoring capacity, while performing his official functions, he should be treated by the International Tribunal *qua* an individual. Such an officer is present in the former Yugoslavia as a member of an international armed force responsible for maintaining or enforcing peace and not *qua* a member of the military structure of his own country."<sup>52</sup> It is less than clear why the national versus international structure of a military organization should change the availability of an individual eyewitness at trial, unless the Appeals Chamber believes that members of a troop-contributing country have a greater duty of obedience to Security Council decisions than do the soldiers of belligerents.



One promising caveat noted by the Appeals Chamber is that where a State has been required to produce documents for trial and the pertinent State official resists doing so, if the State is unable to coerce his compliance, then "it is sound practice to 'downgrade', as it were, the State official to the rank of an individual acting in a private capacity," and subject him to a subpoena and proceedings for contempt.<sup>53</sup>

But the Appeals Chamber also limits the scope of subpoena power in a fashion that could make prosecutions more difficult. Citing Croatia's stylized complaint against "highly controversial U.S.-style discovery process," the Appeals Chamber strictured that any requests must identify "specific documents," rather than "broad categories," must not be "unduly onerous" or "overly taxing" and certainly could not number in the "hundreds of documents."<sup>54</sup> In trying to reconstruct battlefield supervision, these may not be realistic limits.

Still, in important steps forward, the Appeals Chamber sustains the holding that States are subject to binding orders of the Tribunal for the production of documentary evidence, and dismisses Croatia's contention that an absolute national security privilege should be recognized. Claims that the disclosure of military documents will prejudice national security must be substantiated by submitting the documents to the scrutiny of a Judge of the Trial Chamber for *in camera* review, to decide whether they are relevant to the proceeding and whether their relevance is "outweighed, in the appraisal of the Judge, by the need to safeguard legitimate national security concerns."<sup>55</sup> Redaction of parts of a document may be permitted before their use at trial. In the "exceptional case" of "one or two particular documents" of great "delica[cy] from the national security point of view," a State may be excused from submitting the documents to the Judge based on generic representations of the reasons for this. In a world in which it is dangerous to compromise human intelligence sources and the capability of national technical means, this is a wise exception. The Tribunal faces a considerable dilemma. On the one hand, the proof of command responsibility for atrocities in wartime may often crucially depend on evidentiary use of the belligerents' military records. On the other hand, even former belligerents, and certainly "third party" countries, may have a legitimate concern about national security. The ethical standards attending international judicial office and the procedural precautions described in the Appeals Chamber's opinion may not persuade national governments that they can afford the risks of complete disclosure in the most serious cases. Thus, allowing some practical elbow room in the opinion was the wisest course.

Interestingly, here the Appeals Chamber humors a distinction among State actors. Unlike its earlier insistence that no distinction should be recognized among the sources of obligation to the Tribunal, even for former belligerent States bound by the Dayton Accord,<sup>56</sup> the Appeals Chamber is willing to credit a particular State's track record of cooperation with the Tribunal in assessing a national security claim.<sup>57</sup>

As a matter of interpretive method, one may question the acrobatics of the "clear statement" rule—why the Appeals Chamber is willing to assume that the drafters of the Tribunal's statute intended to preserve the procedural immunity of State officials from subpoena, while newly compelling the disclosure of national security documents. The Appeals Chamber heralds the "innovative and sweeping obligation laid down in Article 29" with "its undeniable effects on State sovereignty and national security."<sup>58</sup> "Whenever the Statute intends to place a limitation on the International Tribunal's powers, it does so explicitly," the Appeals Chamber offers, adding that "it would be unwarranted to read into Article 29 limitations or restrictions on the powers of the International Tribunal not expressly envisaged either in Article 29 or in other provisions of the Statute."<sup>59</sup> One wonders why this interpretive principle applies to the national security exception, but not to the subpoena of State officials or the imposition of coercive measures on former belligerents that decline to produce necessary documents.

One of the difficulties of the method of the *Blaškić* appeals opinion, in the long run, is what it means for the permanent International Criminal Court. The ambivalence toward a tribunal's inherent powers in crafting a workable procedure for investigations and trial places a heavy burden on the prospective State parties of a permanent court, to assure that the new treaty provides for most serious contingencies that a court will face. Unlike a domestic judiciary, where structure and procedure can be crafted by the courts over time in a dialogue with the legislative branch, creational acts in the international system are far more occasional, and treaty amendment will be a slow and cumbersome process. Thus the statute for a permanent court addressed by the Rome diplomatic conference in 1998 must be measured against the strict standard of whether its text yields a workable institution or a stillborn structure. In light of *Blaškić*, one cannot count upon the creative powers of judges to fill out an incomplete sketch.



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Notes

Many of the documents cited in this article are available on the web-site of the International Criminal Tribunal for the former Yugoslavia. <http://www.un.org/icty/>.

1. S.C. Res. 827, May 25, 1993, U.N. S/RES/827 (1993) (approving Report of the Secretary-General and adopting the Statute of the Tribunal).

2. See Indictment, Prosecutor v. Dario Kordic, Tihofil a/k/a Tihomir Blaškić, Mario Cerkez, Ivan a/k/a Ivica Santic, Pero Skopljak, Zlatko Aleksovski, No. IT-95-14, Nov. 10, 1995; superseded as to defendant Blaškić by Amended Indictment, Prosecutor v. Tihomir Blaškić, No. IT-95-14-T, Nov. 15, 1996, and by Second Amended Indictment, *id.*, Apr. 25, 1997.

3. See Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Duško Tadić a/k/a “Dule”, No. IT-94-1-AR72, Appeals Chamber, Oct. 2, 1995, para. 81; Opinion and Judgment, Prosecutor v. Duško Tadić a/k/a “Dule”, Trial Chamber, May 7, 1997, paras. 559, 560, 602-608 (Tadić found not guilty on charges of grave breaches of the Geneva Conventions because armed forces of Republika Srpska were not, at pertinent date and place, *de facto* organs or agents of the Federal Republic of Yugoslavia); *id.*, para. 571 (“the extent of the application of international humanitarian law from one place to another in the Republic of Bosnia and Herzegovina depends upon the particular character of the conflict with which the Indictment is concerned. This depends in turn on the degree of involvement of the [armed forces] and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) after the withdrawal of the JNA [Yugoslav People’s Army] on 19 May 1992.”).

4. In the words of the Second Amended Indictment, if he “planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution” of the illegal acts.

5. In the words of the Second Amended Indictment, if he “knew or had reason to know that subordinates were about to perform illegal acts or had done so, and failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”

6. See Statute of the International Tribunal, in the Secretary General’s Report on Aspects of Establishing of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, art. 7(3), U.N. Doc. S/25704 (May 3, 1993), 32 I.L.M. 1159 (1993).

7. See I.C.J. Statute art. 50.

8. Bosnia and Herzegovina also accepted a subpoena *duces tecum* issued at the request of defendant Blaškić for the production of any exculpatory documents.

9. Decision on the Objections of the Republic of Croatia to the Issuance of *Subpoenae Duces Tecum*, Prosecutor v. Blaškić, No. IT-95-14-PT, Trial Chamber II, July 18, 1997 [hereinafter Blaškić Subpoena Trial Chamber Decision].

10. See Rule 54 of the Rules of Procedure and Evidence, as amended January 1995, in Second Annual Report of the Tribunal, August 23, 1995, and in U.N. Doc. A/50/365:

At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

11. Blaškić Subpoena Trial Chamber Decision, *supra* note 9, para. 14 (emphasis added).

12. See U.N. CHARTER art. 29.

13. Blaškić Subpoena Trial Chamber Decision, *supra* note 9, para. 22.

14. *Id.*, paras. 31 & 32.

15. *Id.*, para. 25.

16. Reparations for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 171.

17. Effects of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion of July 13, 1954, 1954 I.C.J. 47.
18. Certain Expenses of the United Nations, 1962 I.C.J. 151.
19. Blaškić Subpoena Trial Chamber Decision, *supra* note 9, para. 41.
20. *Id.*, para. 34.
21. *Id.*, paras. 36-39.
22. See Statute of the European Court of Justice, art. 21; Statute of the Court of Justice of the European Coal and Steel Community, art. 24; and Statute of the Court of Justice of Euratom, art. 22(1).
23. Statute of the International Tribunal, *supra* note 6, art. 29(2):  
States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to . . . (b) the taking of testimony and the production of evidence.
24. Secretary-General's Report, *supra* note 6, para. 126, cited in Blaškić Subpoena Trial Chamber Decision, *supra* note 9, para. 50.
25. Blaškić Subpoena Trial Chamber Decision, *supra* note 9, para. 61.
26. *Id.*, para. 60.
27. *Id.*, para. 69.
28. *Id.*, paras. 94-96.
29. *Id.*, paras. 97-106. As of the date of this writing, in March 1998, Croatia's challenges to the scope of the subpoenas still have not been resolved.
30. *Id.*, para. 131.
31. *Id.*, paras. 133, 148-49.
32. Decision on the Admissibility of the Request for Review by the Republic of Croatia of an Interlocutory Decision of a Trial Chamber (Issuance of *Subpoenae Duces Tecum*) and Scheduling Order, Prosecutor v. Blaškić, No. IT-95-14-AR108 *bis*, Appeals Chamber, July 29, 1997.
33. *Amicus curiae* briefs were filed by the People's Republic of China, the Government of the Kingdom of the Netherlands, the Governments of Canada and New Zealand, and the Government of Norway. Briefs were also filed by Carol Elder Bruce, Juristes Sans Frontières and Alain Pellet, Max Planck Institute for Foreign and International Criminal Law, Herwig Roggemann, and Ruth Wedgwood.
34. Judge Cassese was joined by Judges Haopei Li of China, Ninian Stephen of Australia, and Lal Chand Vohrah of Malaysia. Judge Adolphus G. Karibi-Whyte of Nigeria filed a separate opinion dissenting only as to the procedure for determining national security claims. See note 55, *infra*.
35. ICTY Press Release, CC/PIO/253-E, Oct. 29, 1997: "SUBPOENA ISSUE: THE APPEALS CHAMBER UNANIMOUSLY QUASHES THE SUBPOENAE ISSUED TO CROATIA AND ITS DEFENCE MINISTER. Prosecutor free to submit a new request for 'a binding order to Croatia alone.'"
36. Judgment on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997, Prosecutor v. Blaškić, No. IT-95-14-AR108 *bis*, Appeals Chamber, Oct. 2, 1997, para. 26 [hereinafter Blaškić Subpoena Appeals Chamber Decision]. Subpoenas, though expressly provided for in Rule 54 of the Tribunal, could only be issued to individuals acting in a private capacity. *Id.*, para. 21.
37. *Id.*, para. 33.
38. *Id.*, para. 36.
39. See Treaty Establishing the European Community, art. 171; cf. Statute of the European Court of Justice, art. 24; but see EUROPEAN COURTS: PRACTICE AND PRECEDENTS §§ 11-63 (Richard Plender ed., 1997).



40. Blaškić Subpoena Appeals Chamber Decision, *supra* note 36, para. 25.

41. The Appeals Chamber's doubt that the Security Council would allow enforcement powers to a subordinate body is challenged by Security Council Resolution 1022 (Nov. 22, 1995), suspending economic sanctions against the Federal Republic of Yugoslavia and Republika Srpska (the Bosnian Serb entity). Resolution 1022 allowed economic sanctions to be automatically reimposed by the High Representative or the military commander of IFOR if either official "informs the Council via the Secretary-General that [the parties] are failing significantly to meet their obligations under the Peace Agreement." The Council could block the reimposed sanctions only with the concurrence of the Council's five permanent members.

Judge Cassese noted, in a November 1996 conference on the Bosnian peace process held at Yale University, that "it was clear when the Security Council passed Resolution 1022 that they regarded cooperation with our Tribunal as a crucial feature of the Dayton Agreement." The High Representative and IFOR commander were given the "clear message . . . that they were free to trigger sanctions." See Remarks of Antonio Cassese, in *AFTER DAYTON: HAS THE BOSNIAN PEACE PROCESS WORKED?* (Ruth Wedgwood ed., Council on Foreign Relations Press, forthcoming 1998).

Resolution 1022 was rescinded on October 1, 1996, after the completion of national elections in Bosnia and Herzegovina. See S.C. Res. 1074, Oct. 1, 1996.

42. See Rules 59(B) and 61(E) of the Rules of Procedure of the Tribunal.

43. Cf. Amicus Curiae Brief submitted by the Netherlands, Prosecutor v. Blaškić, No. IT-95-14-AR108 bis, Sept. 12, 1997, para. 17:

The effectiveness of the Tribunal might be impaired if it is always dependent on decisions to be taken by the Security Council in cases where states continue to refuse to cooperate. For this reason the Netherlands believes there is some basis for arguing that the implied powers of the ICTY make it desirable for there to be a provision comparable to Rule 77 [a court-made rule on contempt] which would be applicable to states so that fines or other penalties may be imposed whenever the Tribunal establishes that a state has not fulfilled its obligations. In order to clarify this important issue, the Tribunal might ask the Security Council to give a ruling on the question of whether in carrying out its mandate, the Tribunal is entitled to impose fines or other sanctions on a state when it has established that the state has failed to execute an order or subpoena.

44. Blaškić Subpoena Appeals Chamber Decision, *supra* note 36, paras. 38, 43, 45.

45. *Id.*, para. 41.

46. *Id.*, para. 46.

47. *Id.*, paras. 38, 43.

48. *Id.*, para. 49 (emphasis added).

49. *Id.*, para. 50.

50. *Id.*, para. 84.

51. *Id.*, para. 53.

52. *Id.*, para. 50.

53. *Id.*, para. 51.

54. *Id.*, para. 32.

55. *Id.*, para. 68. Judge Adolphus Karibi-Whyte dissented on this issue on the ground that the decision on claims of national security had to be taken by the full Trial Chamber, not a single Judge.

56. *Id.*, para. 29. But see Remarks of Antonio Cassese, in *AFTER DAYTON*, *supra* note 41 ("the obligation to cooperate with our tribunal . . . was restated and even spelled out in the Dayton Agreement" and "extended to the two entities that previously were not directly bound

by it, namely the Federation of Bosnia and Herzegovina and the Republika Srpska.”). See also Blaškić Subpoena Appeals Chamber Decision, *supra* note 36, para. 26, n. 36 (“even if one were to doubt” the status of the Federal Republic of Yugoslavia as a member of the United Nations, because of its suspension from participation in the work of the General Assembly under General Assembly Res. 47/1, 22 Sept. 1992, “its signing of the Dayton/Paris Accord of 1995 would imply its voluntary acceptance of the obligations flowing from Article 29.”).

57. “The degree of bona fide cooperation and assistance lent by the relevant State to the International Tribunal, as well as the general attitude of the State vis-à-vis the International Tribunal (whether it is opposed to the fulfillment of its functions or instead consistently supports and assists the International Tribunal), are no doubt factors the International Tribunal may wish to take into account throughout the whole process of scrutinising the documents which allegedly raise security concerns.” Blaškić Subpoena Appeals Chamber Decision, *supra* note 36, para. 68.

58. *Id.*, para. 64.

59. *Id.*, para. 63.





# XIX

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## **Military Activities on the High Seas: What Are the Impacts of the U.N. Convention on the Law of the Sea?**

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Rüdiger Wolfrum

**A**CCORDING TO ARTICLE 88 OF THE UNITED NATIONS CONVENTION on the Law of the Sea (LOS Convention), the high seas shall be reserved for peaceful purposes. Similar provisions are contained in Article 141, concerning the use of the deep seabed, and in Articles 240(a) and 246, paragraph 3, regulating marine scientific research. Additionally, Article 301 provides that States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations. The question has been raised as to whether such provisions limit military activities on the high seas.<sup>1</sup> Wolff Heintschel von Heinegg has pointed out that naval activities in the most recent military conflicts have been concentrated in the maritime areas under the sovereignty or jurisdiction of the parties to the conflict concerned.<sup>2</sup> This fact had led earlier to D.P. O'Connell's statement that "an hypothesis that might serve to minimize the threat to the peace which results from situations of limited hostilities would be that no belligerent acts are permitted on the high seas



except in case of immediate and direct self-defence.”<sup>3</sup> However, this statement does not seem appropriately to reflect State practice.<sup>4</sup>

The following presentation seeks to establish whether and to what extent the provisions of the Convention on the Law of the Sea, and in particular Article 88, restrict military activities on the high seas. The view is commonly held that the LOS Convention forms part of the international law of peace<sup>5</sup> and thus has limited relevance with respect to activities of States Parties in the time of war.<sup>6</sup>

The purpose of this paper is—at least to a limited degree—to question such an approach, on two grounds. It proposes that even in times of war the parties to a conflict have to respect the rights of other States concerning the use of the sea. The paper will further establish that the traditional division between the international law of war and of peace has lost some of its relevance as far as the utilization of the sea is concerned.

### **Provisions of the UN Convention on the Law of the Sea**

As already mentioned, Article 88 provides that the high seas shall be reserved for peaceful purposes only. The terms “peaceful use” or “for peaceful purposes”<sup>7</sup> as used in international conventions are, in general, highly ambiguous, leaving aside for the moment the fact that Article 301 of the LOS Convention has to be regarded as an attempt to clarify the meaning of this clause. Similar provisions in other international treaties may shed some light on the interpretation of Article 88.

*The Clause Restricting Activities on the High Seas for Peaceful Purposes.* In general, the peaceful use clause may be interpreted as a prohibition of any military activities, or of only aggressive activities in the sense of Article 2, paragraph 4, of the United Nations Charter. A clear interpretation of this term in the former sense is found, for example, in the Antarctic Treaty.<sup>8</sup> It preserves a nonmilitarized status of Antarctica by prescribing in Article I that the continent be used for peaceful purposes only. This general clause is further specified by the Article’s prohibition (the list not being exhaustive) of “any measure of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons.”<sup>9</sup> As an exemption from the general provision, the Article allows the use of military personnel and equipment “for scientific research or for any other peaceful purpose.” This exemption proves that the peaceful purposes clause in the Antarctic Treaty has to be understood as excluding all

military activities.<sup>10</sup> The treaties on Spitzbergen of 9 February 1920<sup>11</sup> and on the Åland Islands of 20 October 1921<sup>12</sup> contain more or less the same interpretation of the peaceful use clause. Based upon those multilateral treaties, the position has been put forward that the peaceful use clause in the LOS Convention has to be understood generally as a prohibition of any military activity.<sup>13</sup>

Having referred to those international treaties using the phrase “peaceful” in the sense of nonmilitary, one should mention the Outer Space Treaty<sup>14</sup> as a counter-example, one where the same clause has been used in the meaning of “non-aggressive.” This interpretation, however, is not undisputed. The arms control provisions of the Outer Space Treaty (Articles III and IV) distinguish between outer space on the one hand, and the moon and other celestial bodies on the other. The Antarctic Treaty, which evidently influenced the wording of the Outer Space Treaty in this respect,<sup>15</sup> served as an example for addressing the moon and other celestial bodies, which have been regulated through Article IV, paragraph two. As this paragraph is not as broadly phrased as the corresponding Article I of the Antarctic Treaty—the prohibition of “any measure of a military nature” is lacking—a less extensive stage of nonmilitarization was intended. Accordingly, the term “for peaceful purposes only” in Article IV, paragraph two, could be read as “non-aggressive.”<sup>16</sup> This interpretation, however, would bring the moon and other celestial bodies under the system envisaged by Article IV, paragraph one, which applies for outer space in general. Such an interpretation would clearly contradict the different wording of the two paragraphs of Article IV. That being so, the moon and the celestial bodies have to be regarded as demilitarized like Antarctica, Spitzbergen, and the Åland Islands.<sup>17</sup> Hence, the way the peaceful use clause is used in other international treaties does not give a clear answer as to its meaning under the LOS Convention.<sup>18</sup>

The legislative history of the equivalent provision in the LOS Convention, Article 88, sheds little light on the meaning of that article. Before the elaboration of the Revised Single Negotiating Text (RSNT),<sup>19</sup> which contained a peaceful use clause, only three drafts existed. None of them had a provision along this line. Nevertheless, the introduction of the peaceful use clause into the RSNT was not intended to change the Single Negotiating Text (SNT) substantially.<sup>20</sup> Article 74 of the SNT (Part II) stated: “The high seas shall be open to all States, whether coastal or landlocked, and their use shall be reserved for peaceful purposes.” The first part of this provision was incorporated into the later Article 76 of the RSNT (Part I), the forerunner of the LOS Convention Article 87, which sets forth the freedoms of the high seas. In turn, Article 74 of the SNT (Part II)



had been inspired by Article 69 of the Malta proposal,<sup>21</sup> which was based upon the Declaration of Principles Governing the Sea-Bed and Ocean Floor beyond the Limits of National Jurisdiction.<sup>22</sup>

The peaceful use clause remained unchanged from issuance of the RSNT in 1976 until 1980, when a draft sponsored by ten States sought to enrich Article 88<sup>23</sup> by adding the following sentence: "All States shall refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations and the principles of international law." Sponsors of the draft clearly interpreted the term "peaceful purposes," contrary to the Antarctic Treaty example, as permitting all nonaggressive acts of a military nature.

The most striking argument that Article 88 does not exclude military activities on the high seas derives from a comparison of the regulations on high seas navigation with those governing passage of warships through foreign territorial seas. According to Article 19 of the LOS Convention, such passage shall be considered not to be innocent if a foreign ship engages in any threat or use of force against the sovereignty, territorial integrity, or political independence of the coastal State, conducts weapons exercises, lands or takes on board any military device, etc. If it is necessary to declare such typical military activities in the territorial sea illegal, even though this area constitutes ocean under national sovereignty in which foreign activities are subject to certain legal restrictions, the activities must be legal on the high seas, which are open to use for all States.<sup>24</sup> Finally, it should be mentioned that Article 298, paragraph 1(b) of the LOS Convention refers to military activities within the context of dispute settlement.

Full clarity on the exact content of the peaceful use clause can be achieved by evaluating the impact of Article 301 of the LOS Convention<sup>25</sup> on the interpretation of Article 88. The legislative history of Article 301 again casts very little light on the intentions of its drafters. The first and only (informal) draft in this respect was tabled by the sponsors who also intended to enrich Article 88, the wording of both drafts being nearly identical.<sup>26</sup> The proposal discussed in the Informal Plenary was redrafted<sup>27</sup> and subsequently received wide support. However, it did not dispose of the reservations of some delegations, who feared that it had an impact on the regulations of innocent passage and transit passage, which contain very similar formulations. Therefore, further consultations took place among interested delegations. These led to a compromise package.<sup>28</sup>

Article 301 is clearly modeled along the lines of Article 2, paragraph 4 of the UN Charter. Apart from differences that are clearly of a drafting nature, one distinction has to be stated. Instead of the term “or in any manner inconsistent with the purposes of the United Nations,” Article 301 uses the phrase “or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.” This difference highlights that Article 301 refers not only to Chapter I of the UN Charter (Purposes and Principles) but to other parts too, such as Chapter VII, which includes Article 51 (right of self-defense).<sup>29</sup>

In conclusion, Article 88, considered in the light of Article 301, does not impose any obligations upon States exceeding those of Article 2, paragraph 4, of the UN Charter.<sup>30</sup> It is, however, a different question whether restrictions derive from other aspects of the rules of the LOS Convention concerning activities on the high seas.

***Restrictions Deriving from the Freedom of the High Seas and Rights Concerning Deep Seabed Mining.*** The freedom of the high seas as enshrined in Article 87 of the LOS Convention, although embracing the possibility of all States undertaking military activities on the high seas,<sup>31</sup> may also serve as a limitation on such activities. In accordance with Article 87, paragraph 2, the exercise of the freedom of the high seas is limited by the interest of other States in their exercise of the freedom of the high seas (due regard clause). Equally, under the same provision,<sup>32</sup> the rights with respect to activities in the “Area” have to be duly respected.<sup>33</sup> However, the obligation to respect other uses of the sea is not a one-sided obligation, since activities in the Area<sup>34</sup> shall be carried out with reasonable regard for other activities in the marine environment. Hence, a balance has to be struck, for example, between the freedom of the high seas, in particular the freedom of navigation, and any military activity not prohibited under Article 301, which restricts such freedom of navigation.

One of the most controversial issues discussed in this context is whether a party to a conflict may establish maritime zones of war or zones of exclusion from which shipping is totally or partially excluded, thus limiting freedom of navigation and overflight. The system of maritime exclusion zones was first introduced in the Russo-Japanese War by Japan, in an effort to control the navigation of neutral Powers in specified areas. In the First World War, the United Kingdom proclaimed the North Sea to be a military area within which exceptional measures would be taken. This was in response to indiscriminate minelaying by Germany. In 1915 Germany declared that all maritime spaces



surrounding the British Isles constituted a war zone in which any enemy merchant vessel would be sunk by submarines, even if it was not possible to save the crew or passengers. Equally, the ships of neutral States would be exposed to danger.

In the Second World War, the United Kingdom declared exclusion zones, which were effected by means of mine fields. The exclusion zones declared by Germany were of a different nature; in these all shipping would be attacked on sight. The International Military Tribunal of Nuremberg declared the establishment of the latter zones to constitute a war crime.<sup>35</sup> More recent examples of the establishment of war zones were the two proclamations of the United Kingdom in 1982 establishing a "maritime exclusion zone" around the Falkland islands, which had been occupied by Argentine forces. These zones were first directed against Argentine warships and Argentine naval auxiliaries, but they were later transformed into a "total exclusion zone" directed against any non-Argentine ships, aircraft, or the like giving support to the Argentine occupation.<sup>36</sup> At the end of hostilities, this zone was cancelled.

In assessing State practice after the Second World War<sup>37</sup> one cannot but state that the practices of the various States differ significantly. It is worth considering whether the LOS Convention limits the establishment of exclusion zones beyond existing restrictions recognized under the international law of war.

Pursuant to Article 88, paragraph 1, of the LOS Convention, the ships of all States (not only of States Parties) enjoy the right of freedom of navigation. This provision reflects a wider principle underlying the rules of the convention, namely that the *ius communicationis* among nations. However, the right to freedom of navigation is not unrestricted. It is to be used with due regard to the interests of other States in their exercise of the freedom of the high seas, which includes respect for military activities. Even in times of war, the freedom of navigation cannot be regarded as suspended between States which are not parties to the conflict. In this respect, it has to be taken into consideration that the Convention does not just govern the relations among certain States but establishes a comprehensive legal order for the use of ocean space,<sup>38</sup> taking into consideration that the rights of States which are not parties to the conflict also prevail in times of war. Accordingly, the establishment of exclusion zones is restricted. The freedom of navigation requires that limitations imposed upon shipping by the establishment of exclusion zones—and the same applies to overflight—have to be kept to the minimum necessary. Neither the limitations imposed upon shipping in these zones (nor their duration) nor the rights of military ships therein may exceed what is strictly necessary (principle of necessity and proportionality) for the protection of the security of the party to

the conflict having established the zone. In consequence thereof, the range of military activities is limited, and they may not be directed indiscriminately against military and nonmilitary targets.<sup>39</sup> Only under such preconditions and with proper notification may one characterize marine exclusion zones as a valid limitation on the freedom of navigation and overflight.<sup>40</sup> This balance of rights is appropriately reflected in paragraph 106 of the *San Remo Manual*,<sup>41</sup> which reads:

However, should the belligerent, as an exceptional measure, establish such a zone: (a) the same body of law applies both inside and outside the zone; (b) the extent, location and duration of the zone and the measures imposed shall not exceed what is strictly required by military necessity and the principle of proportionality; (c) due regard shall be given to the rights of neutral States to legitimate uses of the seas; (d) necessary safe passage through the zone for neutral vessels and aircraft shall be provided: (i) where the geographical extent of the zone significantly impedes free and safe access to the ports and coasts of a neutral State; (ii) in other cases where normal navigation routes are affected, except where military requirements do not permit; and (e) the commencement, duration, location and extent of the zone, as well as the restrictions imposed, shall be publicly declared and appropriately notified.

Similar problems arise with regard to laying mines.<sup>42</sup> Mines have frequently been used as a means of sea warfare,<sup>43</sup> and although they are considered indispensable, attempts have been made to restrict their use. In this respect, one should refer to the 1907 Hague Convention on Mine Warfare at Sea (which, however, has not entered into force).<sup>44</sup> The International Court of Justice has dealt with the emplacement of sea mines twice. In the *Corfu Channel Case*,<sup>45</sup> it stated:

The obligation incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefields exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.

In the *Nicaragua Case*,<sup>46</sup> it argued along the same lines:

The Court has noted above . . . that the United States did not issue any warning or notification of the presence of the mines which had been laid in or near the



ports of Nicaragua. Yet even in time of war, the Convention relative to the laying of automatic submarine contact mines of 18 October 1907 (the Hague Convention No. VIII) provides that "every possible precaution must be taken for the security of peace shipping" and belligerents are bound

"to notify the danger zones as soon as military exigencies permit, by a notice addressed to shipowners, which must also be communicated to the Governments through the diplomatic channel" (art. 3).

... [I]n peacetime for one State to lay mines in the internal or territorial waters of another is an unlawful act; but in addition, if a State lays mines in any waters whatever in which the vessels of another States have rights of access or passage, and fails to give any warning or notification whatsoever, in disregard of the security of peaceful shipping, it commits a breach of the principles of humanitarian law underlying the specific provisions of Convention No. VIII of 1907.

This view, namely that the State emplacing sea mines is faced with obligations to safeguard the interests and rights of third States, was confirmed by Judge Schwebel in his Dissenting Opinion in the *Nicaragua Case*.<sup>47</sup>

Leaving aside the prohibition of certain mines due to the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and the Subsoil Thereof, February 11, 1971,<sup>48</sup> some restrictions on the emplacement of mines may be derived from the LOS Convention.<sup>49</sup>

Again, the interests and rights of third States in the maintenance of the freedom of navigation have to be balanced against the security interests of the belligerent parties. The principle of the freedom of navigation requires that the emplacement of minefields meets the conditions of the principles of necessity and proportionality. Minefields must not amount to a blockage of navigation to and from ports of nonbelligerent States, the national occupation of areas of the sea, or the unnecessary abolishment of the freedom of navigation for ships of nonbelligerent States. Generally speaking, States emplacing minefields are under an obligation to take every precaution to secure the safety of shipping of nonbelligerent States. Only to the extent that the emplacement of mines leaves room for a safe passage of ships of nonbelligerent States, the minefields are appropriately published, and the fields are kept under permanent surveillance and meet the applicable international rules on marine warfare may the resulting restrictions on the freedom of navigation be justified. The rules provided on that point in the *San Remo Manual* fail to meet these criteria fully. It reads: "The

mine-laying States shall pay due regard to the legitimate uses of the high seas by, inter alia, providing safe alternative routes for shipping of neutral States.”

This provision does not—as does the one on zones of exclusion—adequately reflect that restrictions imposed upon the freedom of navigation of ships of nonbelligerent States on the high seas should be regarded as an exception which needs particular justification. The restrictions imposed upon third States have to meet a double standard. First, they have to conform to the rules of warfare at sea; as the rules of warfare already restrict indiscriminate attacks, this must be even more true if ships of nonbelligerent States are made the target of an attack. Additionally, military activities must not restrict the freedom of navigation in an unreasonable manner.

One further aspect should be taken into consideration. Sea mines may result in a negative change of the marine environment to the extent that they constitute a hindrance to marine activities in the respective area. In this context, note should be taken of the fact that Article 192 of the LOS Convention obliges all States to protect and to preserve the marine environment. Might this obligate States concerned to remove sea mines? This possibility deserves further consideration.

## Conclusion

As indicated at the outset of this article, one may wonder whether an area designed for the common use of the community of States may be appropriately used by certain States for activities which by their very nature exclude or at least severely restrict the use by other States. That the Third United Nations Conference on the Law of the Sea avoided issues relating to naval warfare does not preclude the Convention from having an impact thereon. Under the modern doctrine of international law, one cannot distinguish between the international law of peace and the international law of war sufficiently to conclude that the former does not apply in times of war. It is even doubtful whether such an approach was accepted under international law before the Second World War. Apart from that, and with respect to the questions dealt with in this article, one should not forget that the UN Convention on the Law of the Sea is a law-making treaty,<sup>50</sup> which is not meant to deal with the relationship between particular parties but rather to establish a legal order for the utilization of the sea. Such order prevails in times of war at least for the nonbelligerent States. Accordingly, the rights nonbelligerent States have under this order are not meant to be restricted by the fact of war. Even under the rules of neutrality, belligerent States are under an obligation not to infringe



unnecessarily the rights of nonbelligerent States. In this respect, one may even invoke a main principle of humanitarian law referred to earlier, namely, that in a conflict indiscriminate attacks are to be avoided. What applies to the civilian population or protected objects of a party to a conflict should certainly be applicable in favor of nonbelligerents, as well as their nationals. Therefore, under the new rules governing the use of the sea it might be worthwhile to reconsider D.P. O'Connell's hypothesis, set forth above, that military activities at sea are limited to the zones under the jurisdiction of the parties to the conflict, whereas military activities on the high seas are limited to the ones necessary in direct and immediate self-defense.

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### Notes

1. See, in this respect, HEINTSCHEL VON HEINEGG, *SEEKRIEGSRECHT UND NEUTRALITÄT IM SEEKRIEG* 235 ff. (1995), although the declaration made by Brazil upon signature and ratification of the LOS Convention refers to the "maritime areas under the sovereignty or jurisdiction of the coastal State" (Law of the Sea Bulletin No. 5, July 1985, at 6; No. 25, June 1994, at 11) and, thus, has no relevance for the high seas.

2. HEINTSCHEL VON HEINEGG, *supra* note 1, at 226 ff. Particular reference is made to a statement made by the U.S. government vis-à-vis North Vietnam on August 3, 1964:

United States ships have traditionally operated freely on the high seas, in accordance with the rights guaranteed by international law to vessels of all nations. They will continue to do so and will take whatever measures are appropriate for their defense. The United States Government expects that the authorities of the regime in North Viet-Nam will be under no misapprehension as to the grave consequences which would inevitably result from any further unprovoked. . . .

3. O'Connell, *International Law and Contemporary Naval Operations*, 44 BRIT. Y.B. INT'L L. 19, 82 (1970). Ronzitti, *The Crisis of the Traditional Law Regulating International Armed Conflicts at Sea and the Need for Its Revision*, in *THE LAW OF NAVAL WARFARE*, 1, 5 (Ronzitti ed., 1988), states in this respect:

Therefore, practice shows a tendency to confine naval operations to areas close to the coast of belligerents and even to their territorial waters. However, it is difficult to say whether this practice is dictated by a legal conviction to do so or by considerations of advantage, as, for instance, when belligerents have limited naval capability.

4. See HEINTSCHEL VON HEINEGG, *supra* note 1, at 229 ff.

5. Halkiopoulos, *The Interference between the Rules of the New Law of the Sea and the Law of War*, in *A HANDBOOK ON THE NEW LAW OF THE SEA* 1321 (Dupry & Vignes eds., 1991).

6. HEINTSCHEL VON HEINEGG, *supra* note 1, at 236. A more cautious view is that of Rauch, *Military Uses of the Oceans*, 28 GERMAN Y.B. INT'L L. 229, 233 (1985). This author only states that the provisions of the Convention are not meant to regulate the law of naval warfare.

7. The wording of the clause varies to a certain extent. Article 143; 147, paragraph 2 (d); 155, paragraph 2; 240 (a); and 246 add the word "exclusively." However, this difference, compared to Articles 88, 141, and 242, does not justify a different interpretation.

8. 402 U.N.T.S. 71.

9. Taubenfeld, *A Treaty for Antarctica*, in INTERNATIONAL CONCILIATION, No. 531, at 262 ff. (1961), points out that the conclusion of such a far-reaching demilitarization clause was only possible because Antarctica was regarded to be of very limited strategic value.

10. Senator Engle, Hearings before the Committee on Foreign Relations, U.S. Senate, 86th Cong., 2d sess. June 14, 1960, at 5.

11. 2 L.N.T.S. 7.

12. 9 L.N.T.S. 217.

13. The best evaluation of the Soviet literature, which for a long period endorsed such an interpretation, is to be found in: RAUCH, POLITISCHE KONSEQUENZEN UND MÖGLICHKEITEN DER SEERECHTSENTWICKLUNG AUS DER SICHT DER UDSSR, BERICHTE DES BUNDESINSTITUTS FÜR OSTWISSENSCHAFTLICHE UND INTERNATIONALE STUDIEN 21 ff. (1977).

14. 610 U.N.T.S. 205, 6 I.L.M. 386 (1967).

15. Dembling, *Principles of Space Law*, in MANUAL OF SPACE LAW 360 ff. (with further references) (Jasentuliyana & Lee eds., 1979).

16. Meyer, *Der Weltraumvertrag*, 16 ZEITSCHRIFT FÜR LUFTRECHT UND WELTRAUMRECHTSFRAGEN 65, 69 (1967); FAWCETT, INTERNATIONAL LAW AND THE USES OF OUTER SPACE 34 (1968).

17. Stein, *Legal Restraints in Modern Arms Control Agreements*, 66 AM. J. INT'L L. 255, 261 (1972), Wolfrum, *Restricting the Use of the Sea to Peaceful Purposes: Demilitarization in Being?* 24 GERMAN. Y.B. INT'L L. 200, 202 (1981).

18. As to the development of such clause, see Vukas, *Peaceful Uses of the Sea, Denuclearization and Disarmament*, in Dupuy & Vignes, *supra* note 5, at 1233, 1235 ff.

19. U.N. Doc. A/CONF. 62/WP.8/Rev.1.

20. Informal Single Negotiating Text - U.N. Doc. A/CONF.62/WP.8; Zedalis, "Peaceful Purposes" and other Relevant Provisions of the Revised Composite Negotiating Text: A Comparative Analysis of the Existing and the Proposed Military Regime for the High Seas, 7 SYRACUSE J. INT'L & COMP. L. 1, 18 (1979).

21. U.N. Doc. A/AC.138/53: "International Ocean Space shall be open to use exclusively for peaceful purposes by all States, whether coastal or landlocked, without discrimination in accordance with the provisions of this Convention."

22. A/Res.2749 (XXV), para. 5, which, however, only referred to the seabed.

23. In Doc. C.2/Informal Meeting/55, March 20, 1980, Peru, one of the cosponsors introduced a similar proposal as a drafting change. Text in UNCLOS III (1st series, vol. V) 66 (Platzöder ed.).

24. Rauch, *Militärische Aspekte der Seerechtsentwicklung*, in ASPEKTE DER SEERECHTSENTWICKLUNG 75, 80 ff. (Vitzthum ed., 1980) (with further arguments); Wolfrum, *supra* note 17, at 214; Vukas, *supra* note 18, at 1238.

25. Article 301 of the LOS Convention reads:

In exercising their rights and performing their duties in accordance with the provisions of this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.



26. GP/1, 21 March 1980: "In exercising their rights and performing their duties in the different zones of the ocean space all States shall refrain from any threat of use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations." Informal proposal by Costa Rica, Ecuador, El Salvador, Pakistan, Peru, Philippines, Portugal, Senegal, Somalia, and Uruguay. Text in Platzöder, *supra* note 23, at vol. V, 60.

27. For details, see Supplementary Report of the President on the Work of the Informal Plenary, U.N. Doc. A/CONF.62/L.53 Add. 1, para. 6.

28. For further details, see Wolfrum, *supra* note 17, at 215.

29. *Id.* at 215.

30. Oxman, *The Regime of Warships under the United Nations Convention on the Law of the Sea*, 24 VA. J. INT'L L. 831 ff. (1984); Kwiatkowska, *Military Uses in the EEZ—A Reply*, 11 MARINE POL'Y 249 (1987); Treves, *La notion d'utilisation des espaces marins à des fins pacifiques*, 26 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 687 (1980).

31. Fenrick, *The Exclusive Economic Zone Device in the Law of Naval Warfare*, 1986 CAN. Y.B. INT'L L. 91, 93; Heintschel von Heinegg, *supra* note 1, at 255.

32. See also *supra* Art. 147, para. 3, LOS Convention.

33. Lowe, *The Laws of War at Sea and the 1958 and 1982 Conventions*, 12 MARINE POL'Y 286, 294 ff. (1988).

34. Defined as "activities of exploration for, and exploitation of, the resources of the Area" (Art. 1, para. 3, LOS Convention).

35. SCHENK, SEEKRIEG UND VÖLKERRECHT 69-75 (1958). For a more detailed account of the establishment of zones of exclusion, see 2 OPPENHEIM, INTERNATIONAL LAW, (Disputes, War, and Neutrality) 678-684 (H. Lauterpacht ed., 8th ed. 1955); 2 O'CONNELL, THE INTERNATIONAL LAW OF THE SEA (Shearer ed., 1984); Halkiopolous, *supra* note 5, at 1326; Zemanek, *War Zones*, 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 337, 338 (1981-1989).

36. For further details, see Halkiopolous, *supra* note 5, at 1327; O'CONNELL *supra* note 35, at 1111-12; HEINTSCHEL VON HEINEGG, *supra* note 1, at 447 ff.

37. As to more recent examples, for instance in the Gulf War, see HEINTSCHEL VON HEINEGG, *supra* note 1; LEVIE, MINE WARFARE AT SEA (1992).

38. See, in this respect, the Preamble, which states in its fourth paragraph:

Recognizing the desirability of establishing through this Convention, with due regard to the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication.

39. Zemanek, *supra* note 35; opening a wider range of possibilities for military action, Lagoni, *Gewaltverbot, Seekriegsrecht und Schifffahrtswfreiheit im Golfkrieg*, in FESTSCHRIFT WOLFGANG ZEIDLER, 1833, 1855 (1987); see also Fenrick, *supra* note 31, at 122.

40. HEINTSCHEL VON HEINEGG, *supra* note 1, at 464 ff.; Zemanek, *supra* note 35, at 338.

41. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Doswald-Beck ed., 1995).

42. For further details, see LEVIE, *supra* note 37, at 41 ff., 177; Hoog, *Mines*, 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 35, at 284.

43. For details, see LEVIE, *supra* note 37, at 9 ff.

44. For details, see *id.* at 23 ff.

45. 1948 I.C.J. 15, 22.

46. 1986 I.C.J. 1, 112, § 215.
47. 1986 I.C.J. 266, 368, § 234 ff.
48. 955 U.N.T.S. 115. For an analysis, see Wolfrum, *supra* note 17, at 220 ff.
49. See the analysis of HEINTSCHEL VON HEINEGG, *supra* note 1, at 393 ff. (with further references).
50. 1 OPPENHEIM, INTERNATIONAL LAW (Peace) 1203 ff. (Jennings & Watts eds., 1992).





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